



POLICE DEPARTMENT

The
City of
New York

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In the Matter of the Disciplinary Proceedings :
- against - : FINAL
Detective Gescard Isnora : ORDER
Tax Registry No. 928514 : OF
Patrol Borough Brooklyn North : DISMISSAL
-----x-----

Detective Gescard Isnora, Tax Registry No. 928514, Shield No. 3137, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 82789/07, as set forth on form P.D. 468-121, March 29, 2007, and after a review of the entire record, Respondent Isnora has been found Guilty of Specifications Nos. 6 and 7. The Department moved to dismiss Specification Nos. 1 through 5.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Detective Gescard Isnora from the Police Service of the City of New York.

A handwritten signature in black ink, appearing to read "Raymond W. Kelly".

RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: On March 23, 2012 @0001HRS.

COURTESY • PROFESSIONALISM • RESPECT



POLICE DEPARTMENT

The
City of
New York

December 22, 2011

In the Matter of the Charges and Specifications

X : Case No. 82789/07

- against -

Detective Gescard Isnora

Tax Registry No. 928514

Patrol Borough Brooklyn North

At: Police Headquarters
 One Police Plaza
 New York, New York 10038

Before: Honorable Martin G. Karopkin
 Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: Kathleen Kearns, Esq.,
 Nancy Slater, Esq., and
 Adam Sheldon, Esq.
 Department Advocate's Office
 One Police Plaza
 New York, New York 10038

For the Respondent: Philip Karasyk, Esq. and
 James Moschella, Esq.
 Karasyk & Moschella, LLP
 225 Broadway-32nd Floor
 New York, New York 10038

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

COURTESY • PROFESSIONALISM • RESPECT



POLICE DEPARTMENT

December 22, 2011

In the Matter of the Charges and Specifications : Case No. 84030/08

- against - :

Police Officer Michael Carey :

Tax Registry No. 929831 :

Patrol Borough Manhattan South :

At: Police Headquarters
 One Police Plaza
 New York, New York 10038

Before: Honorable Martin G. Karopkin
 Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: Kathleen Kearns, Esq.,
 Nancy Slater, Esq., and
 Adam Sheldon, Esq.
 Department Advocate's Office
 One Police Plaza
 New York, New York 10038

For the Respondent: Stephen C. Worth, Esq.
 Worth, Longworth & London, LLP
 111 John Street Suite 640
 New York, New York 10038

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

COURTESY • PROFESSIONALISM • RESPECT

The above-named members of the Department appeared before me on October 20,¹ 24, 25, 26, 27, and November 2, 2011, charged with the following:

Disciplinary Case No. 82789/07

1. Said Detective Gescard Isnora, assigned to Manhattan South Vice Enforcement Division, while on-duty, on or about November 25, 2006, in Queens County, acting in concert with Detective Michael Oliver, each aiding the other, with the intent to cause serious physical injury to a person, identity known to the Department, caused the death of another person, identity known to the Department, by shooting said person with a loaded firearm.

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 125.20 (1) - MANSLAUGHTER IN THE
FIRST DEGREE

2. Said Detective Gescard Isnora, assigned to Manhattan South Vice Enforcement Division, while on-duty, on or about November 25, 2006, in Queens County, acting in concert with Detective Michael Oliver, each aiding the other, recklessly caused the death of a person, identity known to the Department, by shooting said person with a loaded firearm.

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 125.15 (1) - MANSLAUGHTER IN THE
SECOND DEGREE

3. Said Detective Gescard Isnora, assigned to Manhattan South Vice Enforcement Division, while on-duty, on or about November 25, 2006, in Queens County, acting in concert with Detective Michael Oliver, each aiding the other, with intent to cause serious physical injury to another person, identity known to the Department, did cause such injury to said person by means of deadly weapon.

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 125.10 (1) - ASSAULT IN THE FIRST DEGREE

4. Said Detective Gescard Isnora, assigned to Manhattan South Vice Enforcement Division, while on-duty, on or about November 25, 2006, in Queens County, he recklessly caused serious physical injury to another person, identity known to the Department, by means of a deadly weapon.

¹ On this date, a visual inspection was made of the scene of the November 25, 2006, incident.

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 125.05 (4) - ASSAULT IN THE
SECOND DEGREE

5. Said Detective Gescard Isnora, assigned to Manhattan South Vice Enforcement Division, while on-duty, on or about November 25, 2006, in Queens County, while acting in concert with Detective Michael Oliver and Detective Marc Cooper, each aiding the others, did recklessly engage in conduct which created a substantial risk of serious physical injury to another person, identity known to the Department, by discharging a firearm multiple times on Liverpool Street while other persons were present on Liverpool Street.

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT
NYS PENAL LAW SECTION 120.20 RECKLESS ENDANGERMENT IN
THE SECOND DEGREE

6. Detective Gescard Isnora, while assigned to the Club Initiative Enforcement Unit as an undercover officer, on or about November 25, 2006, in the vicinity of 143-08 94th Avenue, Queens County, New York, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: Detective Isnora, acting as an undercover and while other non-undercover officers were available to take appropriate enforcement action, did himself undertake enforcement action and did unnecessarily stop and engage suspects thereby placing his safety and that of other persons in jeopardy. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT
VICE ENFORCEMENT DIVISION MANUAL, OPERATIONAL
PROCEDURES, 20-10, Page 4 of 5

7. Detective Gescard Isnora, while assigned to the Club Initiative Enforcement Unit, on or about November 25, 2006, in the vicinity of 143-08 94th Avenue, Queens County, New York, did discharge his firearm outside Department guidelines. (*As amended*)

P.G. 203-12 DEADLY PHYSICAL FORCE

Disciplinary Case No. 84030/08

1. Police Officer Michael Carey, while assigned to the Club Initiative Enforcement Unit, on or about November 25, 2006, in the vicinity of 143-08 94th Avenue, Queens County, New York, did discharge his firearm outside Department guidelines.

PG 203-12, Page 1 DEADLY PHYSICAL FORCE

Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 82789/07

The Department moved to dismiss Specification Nos. 1 through 5. Respondent Isnora is found Guilty of Specification Nos. 6 and 7.

Disciplinary Case No. 84030/08

Respondent Carey is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

STIPULATED FACTS

Two stipulations were entered into evidence during this proceeding which reflect facts which were agreed to by all parties.

Stipulation No. 1

This stipulation [Department's Exhibit² (DX) 1] is set forth in its entirety:

Introduction

The New York City Police Department's Club Initiative, also commonly referred to as the Club Enforcement Unit, was formed to eradicate illegal activities inside bars and

² Exhibits were pre-numbered on consent prior to the start of this proceeding. However, not all of the numbered exhibits were introduced into evidence, resulting in some gaps in the numbering.

nightclubs by making arrests for narcotics and prostitution and then utilizing the nuisance and abatement procedures to close down the establishments. The Club Initiative was a joint operation between the Vice Enforcement Division and the Narcotics Division and was staffed by members of both units who were re-assigned to the Club Initiative Unit.

In the early morning hours of November 25, 2006, the Club Initiative Unit, operating out of the 7 Precinct, was conducting an undercover enforcement operation inside Kalua when members of the team were involved in the fatal shooting of a civilian, **Person A** in the vicinity of the club. On that morning, the Club Initiative Unit was comprised of the following members of the service: Lieutenant Gary Napoli (Team Leader), Detective Marc Cooper (Apprehension Team), Detective Michael Oliver (Apprehension Team/Prisoner Van), Detective Hispolito Sanchez (Undercover/Ghost), Detective Paul Headley (Apprehension Team/Arresting Officer), Detective Rasheda Edness (Undercover), Detective Shannon Graham (Undercover), Detective Gescard Isnora (Undercover), Police Officer Michael Carey (Apprehension Team/Prisoner Van).

TAC Plan & TAC Meeting

On November 24, 2006, at approximately 2300 hours, a Tactical Plan ("TAC Plan") was prepared by Detective Headley, the arresting officer, and a meeting ("TAC Meeting") was held by Lieutenant Napoli, the Team Leader, in the Club Initiative office. The meeting lasted approximately thirty (30) minutes. Detective Headley retrieved a copy of a previously utilized TAC Plan from a filing cabinet in the Club Initiative office. The TAC Plan was partially completed and contained typewritten and handwritten information. Some of the handwritten portions were completed by Detective Headley in

preparation for the TAC Meeting on November 24, 2006, however, other handwritten captions were already on the TAC Plan when he retrieved the copy. Detective Headley did not personally type the typewritten portions that appeared in the captions. [DX 1A is a copy of the TAC Plan.]

Prior to the TAC Meeting, Detective Headley discussed the TAC Plan with Lieutenant Napoli. Lieutenant Napoli instructed Detective Headley to assign Detective Cooper to the Toyota Camry. The Camry was to be the Team Leader's vehicle that Detective Headley would drive with Lieutenant Napoli as front seat passenger and Detective Cooper in the backseat. Prior to the TAC Meeting, Detective Oliver and Police Officer Carey volunteered to take the prisoner van assignment, utilizing a green Ford Freestar minivan. Detective Isnora was assigned as the undercover with Detective Sanchez as the ghosting undercover. These undercover officers were assigned to a green Mitsubishi Galant. Detective Edness and Detective Graham, female undercover officers, were also assigned to the Galant and due to the demographics inside Kalua, they were not being utilized that morning. The four (4) undercover officers were not listed on the TAC Plan as being in the undercover vehicle.

The TAC Plan listed eight (8) enforcement locations for the tour. These handwritten locations were already listed on the TAC Plan when Detective Headley retrieved a copy of it from the file cabinet in the office. The locations were listed as follows but none of the locations were discussed at the TAC Meeting as possible enforcement locations and none were visited on November 25, 2006: Queen of the Sea, Illusions, Club Occasions, Zone Lounge, La Brasserie, Herbie's Bar, Secret's Lounge, Alisha's.

Both Kalua and Club Amazoro had been discussed in some fashion during the TAC Meeting. Kalua was a strip club and two (2) prior arrests were made at Kalua earlier in the same week. Those two (2) arrests were initiated by Detective Isnora who was inside Kalua in an undercover capacity and engaged two (2) females in conversation wherein the females agreed to provide narcotics to Detective Isnora in exchange for money and thereafter one (1) of those same females engaged Detective Isnora in further conversation and offered to perform a sex act in exchange for money. The Club Initiative Unit required one (1) additional arrest inside Kalua in order to position the Department to apply for a court order to close down Kalua under the nuisance and abatement procedure. Although both Kalua and Club Amarozo were discussed during the TAC Meeting, neither appeared on the TAC Plan and no adjustments were made to it by Detective Headley nor any other member of the Club Initiative Unit. Further, Lieutenant Napoli did not direct anyone, including Detective Headley, to make any adjustments to the TAC Plan.

During the TAC Meeting, the color of the day was not discussed. The "Entry Tools/Other" listed on the TAC Plan (ram, kelly, sledge) were not in the office when the TAC Meeting was held and were not in the Department vehicles when enforcement commenced. The Club Initiative Unit did not have its own safety equipment and generally utilized equipment from the Vice Squad, also located in the 7 Precinct. There was no discussion between Lieutenant Napoli and Detective Headley or any other member of the Club Initiative unit concerning any safety equipment, including the items listed in the TAC Plan under the "Prisoner Van" section (chains/camera/light) or in the "Undercovers" section (beeper, kels/kit). At no time did Lieutenant Napoli inspect any

member of the Club Initiative Unit for safety equipment, nor did he inspect anyone to ensure that they were appropriately outfitted with bullet resistant vests, shields, firearms, flashlights, raid jackets, the color of the day or red warning lights.

The sum of \$270 was handwritten at the top of the TAC Plan. This sum of United States Currency ("USC") represented the pre-recorded buy money to be utilized by the undercover officers during this tour. There is no evidence to indicate that the serial numbers on this currency were photocopied for evidentiary purposes, a responsibility that is typically assigned to the arresting officer. Communications were not discussed during the TAC Meeting. Not every member of the service had a Department radio but there was at least one (1) Department radio in every Department vehicle. The members of the Club Initiative Unit had each other's cell phone numbers; cell phone/text messaging between team members was not uncommon, especially with the undercover officers since it was not practical to take a Department radio into a location where the undercover officer would be patted down and/or searched by club personnel before entering the establishment. The kel device was previously utilized inside Kalua and found by the undercover officer(s) who utilized it to be an ineffective means of communication inside the club due to noise.

The TAC Plan further indicated the "Emergency Hospital" as Jamaica Hospital but incorrectly listed its location as "7 Avenue, 11 Street" – the address of the former Saint Vincent's Hospital located in New York County. During the TAC Meeting, Lieutenant Napoli did not discuss the vehicle that would be designated the hospital car, nor did he discuss that Jamaica Hospital was the designated emergency hospital.

During the TAC Meeting, Lieutenant Napoli indicated that he wanted Detective Sanchez and Detective Isnora inside the target location by approximately 0100 hours, so the team needed to be in the vicinity of Kalua by that time.

The Club Initiative Unit left the 7 Precinct at approximately midnight. Prior to leaving the 7 Precinct, Detective Headley inspected the Camry and observed a red bubble light in the front seat passenger area but did not inspect it to determine its operability. Detective Isnora inspected the Galant for contraband and did not find any; there was no red bubble light inside the Galant. Both Detective Oliver and Police Officer Carey inspected the Freestar and did not find any contraband; there was no red bubble light inside the Freestar.

Arrival in the Vicinity of Kalua

En route to Jamaica, Queens, members of the team were in contact by Department radio. There were at least two (2) radios in the Camry (Napoli, Headley and Cooper) and one (1) each in the Freestar (Oliver and Carey) and Galant (Sanchez, Isnora, Edness and Graham). The Camry drove past both Club Occasions and Club Amazoro before arriving in the vicinity of Kalua at approximately 0030 hours. Kalua was located at 143-08 94th Avenue, Jamaica. The Camry parked in the Air Train parking lot also located on 94th Avenue and across from Kalua. The Galant proceeded directly to the vicinity of Kalua and parked on 95th Avenue, west of Liverpool Street, also at approximately 0030 hours. The Freestar stopped once for food and arrived in the vicinity of Kalua at approximately 0030 to 0045 hours. The Freestar also parked on 95th Avenue, west of Liverpool Street.

Upon setting up in the vicinity of Kalua, both Detective Sanchez and Detective Isnora spoke with Lieutenant Napoli on the phone concerning which undercover officer was going to enter Kalua first. It was agreed that Detective Sanchez would enter the club first to determine if the two (2) females who were arrested earlier in the week were present. Detective Isnora had been part of that operation and would have been ineffective inside Kalua if the females recognized him. At approximately 0100 hours, Detective Sanchez entered Kalua. Detective Sanchez established that the females were not inside the club. Detective Sanchez described the club as dark and crowded with an aggressive male clientele and called Lieutenant Napoli and asked him to send Detective Cooper into the club as well.

Detective Isnora conferred by phone with Lieutenant Napoli and indicated he was ready to enter the club. Before entering Kalua, Detective Isnora secured his firearm and shield with either Detective Edness or Detective Graham, both of whom were to remain with the undercover vehicle. Detective Isnora carried his Department identification card in his wallet that he kept on his person, as well as \$100 USC provided to him for the enforcement operation. Detective Isnora was patted down by the bouncer before entering Kalua. Lieutenant Napoli informed the team that Detective Sanchez and Detective Isnora were inside Kalua.

Inside Kalua

The three undercover officers (Detective Cooper, Detective Sanchez and Detective Isnora) who entered Kalua separately and at different times in the early morning of November 25, 2006, described the club as generally dark, loud and crowded

with aggressive male patrons. The layout included an “L” shaped bar on the right side with a stage area behind the bar. There was another elevated stage area in the rear of the club. Detective Isnora and Detective Sanchez briefly met up at the short end of the “L” shaped bar. Detective Isnora was positioned with his back to the club’s entrance – facing the rear of the club. The undercover officers played the role of acquaintances and shook hands and talked for about 10 to 15 minutes before Detective Sanchez walked away. As the ghost undercover, Detective Sanchez was in the vicinity of Detective Isnora throughout the night but they were not standing next to each other the entire time. During this timeframe, Detective Sanchez ordered a drink and briefly spoke to a female dancer (topless dancers were employed by Kalua for the patron’s entertainment). He bought the dancer a drink and unsuccessfully attempted to solicit her for the purposes of prostitution. During the same approximate timeframe, Detective Sanchez also bought Detective Isnora a rum and coke. The rum and coke was the only alcoholic drink Detective Isnora had in the club; he ordered coke drinks after the rum and coke. Detective Sanchez indicated to Detective Isnora that they should be careful with the crowd in the club. (Detective Sanchez reiterated the same to Detective Cooper after Detective Cooper entered the club.)

After Detective Sanchez walked away, a dancer approached Detective Isnora and asked him to buy her a champagne drink (\$25 USC). Detective Isnora spoke with the dancer and attempted to make plans with her for later in the evening (to solicit her for the purpose of prostitution). The dancer walked away without making arrangements to meet up with Detective Isnora. A second dancer approached Detective Isnora, who remained in the same position at the bar. The second dancer also asked Detective Isnora to buy her

a drink. Detective Isnora had a similar conversation with this dancer. The second dancer walked away without agreeing to meet Detective Isnora later in the morning.

While Detective Isnora and Detective Sanchez were inside the club, there were several calls between the undercover officers and Lieutenant Napoli. The nature of the calls were to apprise Lieutenant Napoli of what was going on inside the club with respect to possible arrests. During one (1) such call, Detective Isnora called Detective Cooper to have him come into the club. Lieutenant Napoli sent Detective Cooper into Kalua to assess the situation and provide added safety in light of the aggressive nature of the crowd. Up until this point, neither Detective Isnora nor Detective Sanchez observed or reported anything that elevated their safety concerns; there was no obvious display of weapons or drug use. Although Detective Cooper was not officially an undercover assigned to the Club Initiative Unit, Lieutenant Napoli sent him into Kalua as an undercover that morning. Detective Cooper was trained as an undercover officer when he was assigned to Organized Crime Control Bureau and had occasionally been utilized, in an unofficial capacity, as an undercover officer, while assigned to the Club Initiative Unit.

Before Detective Cooper entered Kalua, he removed his bullet resistant vest and gun belt. Detective Headley moved the Camry from the Air Train parking lot and drove around the block to 95th Avenue, where Detective Cooper removed his equipment. During that drive around the blocks in the vicinity of Kalua, the Camry passed the Freestar and they discretely acknowledged each other. Detective Headley drove Detective Cooper back to the Air Train parking lot and Detective Cooper walked the short distance from the parking lot to Kalua. Detective Cooper approached Detective

Isnora who was at the bar near the front of the club. Detective Cooper observed the club to be dimly lit and crowded with an unsavory mix of patrons.

At approximately 0150 hours, Detective Sanchez stepped outside Kalua and called Lieutenant Napoli and indicated that everyone was okay and that Detective Isnora and Detective Cooper were talking to females inside the club; he further indicated that they may be able to make arrests. When Detective Sanchez re-entered the club, he was not patted down by the bouncer and observed that many others coming in were not being patted down.

Detective Isnora purchased a Corona for Detective Cooper. Within minutes, a dancer walked up to them and began to converse with Detective Isnora. This dancer was distinguished by a tattoo "crime" across her back. Before the dancer reached them at the bar, Detective Isnora observed a male patron pulling on the dancer's arm and observed the dancer trying to pull away from this male. When the dancer approached Detective Isnora, he engaged her in the same type of conversation he had with the two (2) previous dancers. A short time later, another male dressed in white-colored clothing and wearing a dark-colored White Sox insignia (Major League Baseball) baseball hat, approached the area where Detective Isnora was talking with the dancer. Detective Isnora observed that the male wearing the White Sox hat was walking towards them from the front of the club; he further observed that the dancer appeared to know the male based in the way she addressed him by name. Detective Isnora heard the dancer tell the male wearing the White Sox hat that she was *having trouble with a male patron* (in sum and substance). The male wearing the White Sox hat appeared to look in the direction that the female was indicating. The male wearing the White Sox hat looked back at the female dancer and

responded that *she should not worry* (in sum and substance); *that if the male does something she should let him know* (in sum and substance). When the male wearing the White Sox hat made that statement to the dancer, he took her hand and placed it on his waistband. Detective Isnora noticed what appeared to be a bulge in the waistband of the male at the spot where the male had placed the dancer's hand. Based upon the words and actions of the male in the White Sox hat and Detective Isnora's own observations, Detective Isnora believed that the male wearing the White Sox hat had a firearm in his waistband. After the male wearing the White Sox hat moved to the rear of the club, the dancer gave Detective Isnora her phone number.

Detective Cooper observed the male wearing the White Sox hat approach the dancer that was conversing with Detective Isnora but he could not hear the conversation and did not see the male place the dancer's hand on his waistband. After that exchange however, Detective Isnora indicated to Detective Cooper that he believed the male wearing the White Sox hat had a firearm in his waistband by exclaiming *did you see that?* (in sum and substance). Neither Detective Cooper nor Detective Isnora observed the male wearing the White Sox hat in the club afterwards and neither moved to the rear of the club to look for him.

After re-entering the club, and after the incident with the male wearing the White Sox hat, Detective Sanchez spoke with Detective Isnora. Detective Isnora told Detective Sanchez that he believed there was a male in the club with a firearm and described the incident between the dancer and the male wearing the White Sox hat. Detective Isnora provided Detective Sanchez with a quick description of the male immediately before the female began talking to Detective Isnora again.

Shortly after Detective Cooper entered Kalua, Lieutenant Napoli and Detective Headley briefly left the parking lot to take a personal in the Air Train Station. Before doing so, they notified the team of their location and Detective Edness and Detective Graham indicated they would be going to the Air Train Station for a personal as well. Upon return to the parking lot, Lieutenant Napoli received updates concerning what was transpiring inside Kalua. At various points, both Detective Sanchez and Detective Cooper had cell phone conversations with Lieutenant Napoli.

Detective Cooper had a phone conversation with Lieutenant Napoli and told Lieutenant Napoli that there was a male wearing a White Sox hat inside Kalua that he believed was carrying a firearm. Lieutenant Napoli relayed this information to the prisoner van. There was no plan formulated and no plan relayed to the members of the team who were parked in the vicinity of Kalua. There were additional communications between the undercover officers inside Kalua following that initial report of an armed male inside the club. These communications involved the continued attempts to make an arrest for prostitution.

Exiting Kalua

Between approximately 0330 and 0345 hours, Detective Cooper and Detective Isnora exited Kalua. Detective Sanchez was not with them at this time; Detective Isnora was certain that as the ghost, Detective Sanchez observed them exit the club. Detective Headley and Lieutenant Napoli, in the Camry, were made aware that Detective Isnora and Detective Cooper exited Kalua and drove to the location on 95th Avenue where Detective Cooper had earlier removed his equipment. Detective Cooper and Detective

Isnora were in close proximity to each other when they walked from Kalua. Detective Cooper entered the Camry and proceeded back to the Air Train parking lot. Detective Cooper believed that once they exited the club, the plan was to wait for the male wearing the White Sox hat to exit and the team would stop him.

Detective Isnora exited the club and walked with Detective Cooper to the vicinity of his undercover vehicle and observed Detective Cooper meet up with the Camry. Detective Isnora's intention after leaving Kalua with Detective Cooper was to walk back to the undercover vehicle and position it so as to have a view of Kalua and wait for the male wearing the White Sox hat to exit. As Detective Isnora walked to the undercover vehicle, he looked behind him and did not see Detective Sanchez. Detective Isnora proceeded to the undercover vehicle and retrieved his shield and firearm; he placed the firearm in his pants pocket. Detective Isnora told Detective Edness and Detective Graham that he was going back to Kalua to wait for Detective Sanchez.

At no time did Detective Isnora or Detective Cooper observe Person A Person C Person C or Person B inside Kalua. However, Detective Sanchez observed a male he later identified as Person B inside the club talking very loudly and making [REDACTED] with his arms. Fearing a possible dispute inside the club, Detective Sanchez stepped outside and called Lieutenant Napoli. He conveyed to the Lieutenant that Detective Isnora believed that there was a male inside the club armed with a firearm (male wearing the White Sox hat). Lieutenant Napoli asked Detective Sanchez to get additional information. While standing outside, Detective Sanchez saw Detective Isnora and Detective Cooper exit the club. The three (3) detectives conversed and Detective Isnora provided Detective Sanchez with a more complete account of the incident he

observed between the dancer and the male wearing the White Sox hat. Detective Sanchez re-entered the club and looked for the male wearing the White Sox hat. Detective Isnora and Detective Cooper walked away from Kalua as described above.

Person D

Testimony will be elicited at trial that Detective Isnora returned to Kalua armed with his firearm and in possession of his shield but did not re-enter the club. Detective Isnora remained outside the entrance to Kalua with Detective Sanchez and while standing in that area observed **Person D** pull up in a black SUV. The detectives observed an argument between **Person D** and a group of males that included **Person A**, **Person B**, **Person B** and **Person C**. The Department and the Respondent stipulate that **Person D** was interviewed by personnel from the Queen's District Attorney's Office prior to testifying before the Grand Jury and stated in that interview that he heard Joseph **Person B** state "*we'll get the gat.*" Testimony will be elicited at trial to the events surrounding the above confrontation. The Department and the Respondent stipulate that at a point after the above confrontation, and after the group of individuals in the Joseph **Person B** party left the area of Kalua, **Person D** drove up 94th Avenue and made a right turn onto Liverpool Street; **Person D** squared the block and returned to the front of Kalua to wait for someone.

Blood Alcohol Content – Person A

The Department and the Respondent stipulate that if an official from the Office of the Chief Medical Examiner was called as a witness, that official would testify that the

toxicology report prepared in connection with the investigation into the death of Person A Person A would indicate that he had a blood alcohol content of .16%.

Bumper of Altima

The Department and the Respondent stipulate that if the Director of the New York Police Department Laboratory was called as a witness, he would testify that forensic testing conducted on the front bumper of the Nissan Altima, the vehicle driven by Person A Person A indicated fabric impressions on the bumper consistent with Detective Isnora's pants.

Officers Assigned to the Club Enforcement Unit

The Department and the Respondent stipulate that if Lieutenant Gary Napoli, Detective Marc Cooper, Detective Michael Oliver or Detective Paul Headley were called as witnesses, with respect to observing a firearm or any object that resembled a firearm, the officers would testify that November 25, 2006, during the entire enforcement operation, that they did not observe a firearm or anything resembling that of a firearm on the persons or in the vicinity of Person A Person B or Person C either inside Kalua, in front of Kalua, on 94th Avenue between 143rd Street and Liverpool Street or on Liverpool Street between 94th and 95th Avenues.

Fitness for Duty – Detective Isnora

The Department and the Respondents stipulate that had Lieutenant Michael Wheeler . . . or Sergeant Donald Kipp . . . been called to testify as a witness in this Department Trial, they would testify that they had been called as witnesses in the criminal trial held in Queens County Supreme Court and testified in part, that each

arrived at the crime scene and spoke with members of the Club Enforcement Unit, including Detective Gescard Isnora, and specifically with respect to Detective Isnora, both supervisors made the assessment that Detective Isnora was fit for duty.

Site Visit to Vicinity of Kalua

Upon agreement, the Department and the Respondents visited the vicinity of Kalua located within the confines of the 103 Precinct in Jamaica, Queens. The areas inspected included the interior and exterior of the currently vacated commercial establishment located at 143-08 94th Avenue, between Liverpool Street and 143rd Street that was known in November 2006, as Kalua. The inspection also included the section of 94th Avenue from 143rd Street to Liverpool Street; Liverpool Street from 94th Avenue to 95th Avenue; the Air Train parking lots on the north side of 94th Avenue from the west side of 143rd Avenue to the west side of Liverpool Street; and the elevated Air Train Station positioned across from the corner of 94th Avenue and Liverpool Street.

Stipulation No. 2

This stipulation (DX 9) relates to the ballistics evidence found at the scene. It reads in relevant part:

Police Officer Michael Carey (Sig Sauer):

A total of one (1) projectile was recovered that matched test rounds fired from Police Officer Carey's Sig Sauer. One (1) round was recovered from the scene on Liverpool Street.

Detective Michael Oliver (Sig Sauer):

A total of fifteen (15) projectiles were recovered that matched test rounds fired from Detective Oliver's Sig Sauer. Three (3) were recovered by Dr. Greenburg, Medical Examiner's Office (from Person A [REDACTED] one (1) was recovered from Person C [REDACTED] two (2) were recovered from Person B [REDACTED] four (4) were recovered from the scene on Liverpool Street; four (4) were recovered from the Nissan Altima; and one (1) was recovered from a Dodge Stratus at the scene.

Sig Sauer Characteristics:

Eight (8) projectiles were found to have class characteristics indicating that they were fired from a Sig Sauer. However, these projectiles did not have enough individual characteristics to positively match them to either Detective Oliver's or Police Officer Carey's Sig Sauer. One (1) was recovered by Dr. Greenburg, Medical Examiner's Office (from Person A [REDACTED] four (4) were recovered from the scene on Liverpool Street; one (1) was recovered from a Mercury Villager at the scene; and two (2) were recovered from the Nissan Altima.

Glock Characteristics:

Eleven (11) projectiles were found to have class characteristics indicating that they were fired from a Glock. However, the projectiles did not have enough individual characteristics to positively match them to either Detective Cooper's or Detective Isnora's Glock. Six (6) were recovered from the Nissan Altima; three (3) were recovered from the scene on Liverpool Street; one (1) was recovered from the Air Train Station

(and subsequently matched to Detective Marc Cooper's Glock); and one (1) was recovered from Person B [REDACTED] clothing.

The following projectiles were recovered and found to be unsuitable for analysis:

One (1) was recovered from Person B [REDACTED] clothing; one (1) was recovered from an Audi #DTN5668; one (1) was removed from Person B [REDACTED] one (1) was removed from the Air Train Station; and one (1) was removed from the Nissan Altima.

[DX 9A is a diagram, created by the Crime Scene Unit, depicting where at the scene the ballistics evidence was recovered.]

The Department's Case

The Department called Inspector Patrick Keane, Detective Hispolito Sanchez, Inspector Michael Hurley, and Deputy Chief Kevin Ward as witnesses.

Inspector Patrick Keane

Keane, a 26-year member of the Department, is currently assigned as commanding officer of Internal Affairs Bureau (IAB), Group 54, which is primarily responsible for investigating police-involved shootings, use of force, and death-in-custody cases. It was in this capacity that he became aware of the shooting that took place on Liverpool Street between 94 and 95 Avenues at approximately 4:00 a.m. on November 25, 2006. The Queens South Investigations Unit initially led the investigation into the shooting, but it did so with the assistance of Group 54. Detective Borough Queens also participated in the investigation.

Keane explained that the shooting involved members of the Club Enforcement Unit (CEU), which primarily dealt with nuisance abatement, prostitution arrests, and narcotics enforcement within social clubs. Five CEU members discharged their firearms during the shooting, discharging a total of 50 rounds. As a result of the shooting, Person A was killed and Person B and Person C were injured.

The injuries to Person A were very serious. At the time, Person A was in the driver's seat of a Nissan Altima, Person B was in the front passenger's seat, and Person C was seated in the rear of the car.

Independent of the Department, the Queens District Attorney's Office conducted an investigation of its own. The District Attorney's Office presented their findings to a Grand Jury, which indicted three CEU members: Respondent Isnora, Detective Marc Cooper, and Detective Michael Oliver. A subsequent 2008 bench trial in Queens County Supreme Court resulted in a verdict of not guilty. [Court Exhibits 1 and 2 are transcripts of Person B and Person C Supreme Court testimony.]

Before the criminal trial started, the CEU members who were not indicted were subject to official Department interviews. [DX 4 is the transcript of Respondent Carey's interview, dated May 11, 2007.] After the criminal trial, the Department of Justice notified Department investigators that it was conducting an independent investigation into the matter. Only after the Department of Justice declined to prosecute were the CEU members who had faced criminal charges subject to official Department interviews. [DX 3 and 3A are the transcript and tapes of Respondent Isnora's interview, dated April 7, 2010.]

During his tenure in IAB, Keane has been involved in the investigation of 50 to 60 police-involved shootings. He explained that the way the investigatory process works

in these cases is that the Patrol Borough Investigations Unit makes its recommendation to the Chief of Department's Firearms Discharge Review Board (FDRB). In the current case, a memorandum that was ultimately prepared by the Chief of Department for the Police Commissioner showed that Oliver (who discharged 31 rounds), Cooper (4 rounds), Detective Paul Headley (1 round), Respondent Isnora (11 rounds), and Respondent Carey (3 rounds) were all found by the FDRB to have discharged their firearms outside Department guidelines. Specific to Respondent Isnora, the FDRB found him to have violated three sections of Department guidelines: He did not develop sufficient probable cause to believe that deadly physical force was necessary to protect himself or others from imminent death or serious physical injury; his discharge unnecessarily endangered innocent people; and he discharged his firearm at a moving vehicle when deadly physical force (other than the vehicle) was not being used against him or anybody else. As for Respondent Carey, the FDRB found him to have acted outside guidelines in that his discharge unnecessarily endangered innocent people. [DX 2 is a copy of the Department memorandum from the Chief of Department to the Police Commissioner, dated November 16, 2010.]

On cross-examination, Keane testified he could not recall an official Department interview as long and detailed as Respondent Isnora's. There were seven interrogators present at the interview. Keane believed that the interview was conducted in an orderly manner. He did not recall people speaking over each other at times. According to Keane, Respondent Isnora's answers were not interrupted nor were there half-answered questions. Chief of Internal Affairs, Charles Campisi, was present at the May 9, 2007, official Department interview of CEU member Detective Hispolito Sanchez. Keane

explained that while Campisi does not sit in on official Department interviews on a daily basis, it has happened before.

Keane confirmed that Respondent Carey, along with all of the other CEU members who discharged their firearms, testified under a waiver of immunity before the Grand Jury. Although Respondent Carey was not indicted, he testified at the criminal trial. So far, Respondent Carey has provided three versions of the incident – his Grand Jury testimony, his criminal court testimony, and his official Department interview and Keane has not noted any differences among them.

Headley, who discharged one round and was found by the FDRB to have acted outside Department guidelines, was not disciplined in any way other than being issued a letter of instruction. Keane explained that Headley received no further discipline because the determination that he was outside guidelines was made after the statute of limitations for administrative processing had already passed.

Detective Hispolito Sanchez

Sanchez, a 17-and-a-half year member of the Department currently assigned to the Investigative Support Division of the Organized Crime Control Bureau (OCCB), was a CEU member in November 2006. On November 25, 2006, he was the “ghost” for Respondent Isnora inside of the Kalua Club. At approximately 3:45 a.m. that day, he was in front of the club with Respondent Isnora and Cooper, and they discussed the fact that there was a man inside the club who was wearing a White Sox hat and possibly carrying a gun. Sanchez got this information from Respondent Isnora, who did not provide any more specific information. After the discussion, Sanchez ran inside the club and

attempted to locate the man with the White Sox hat. After unsuccessfully searching inside the club for five to seven minutes, he returned outside. Respondent Isnora was still there, and Sanchez informed him that he had been unable to find the man with the White Sox hat. At the time, Sanchez and Respondent Isnora were standing a few feet east of the club's entrance.

Sanchez described the atmosphere outside of the club as "pretty rowdy" with a lot of people present. One of these people was Person B whom Sanchez described as a very tall black man. Person B was standing in a group of three or four people, including a woman. One of the men in the group was talking to the woman, and Sanchez heard the woman yell, "I'm not fucking all you all," referring to two other groups (consisting of approximately five men each) who were standing further up the block. In response to the woman's comment, the man with whom she was speaking informed her that he was just talking about his immediate group. While the man and the woman continued to negotiate, a slim black man who was dressed in all black and standing in front of a black SUV said something to Person B. While Sanchez could not hear exactly what the man Person D was saying, the tone was indicative of a sarcastic remark. One of Person D hands was inside his jacket. Person B became agitated and said something back to Person D. Sanchez could not hear what Person B said, but Person B and Person D began to argue with each other.

Person D continued to keep his right hand inside his jacket pocket. At the time, Sanchez was standing four to five feet from Person D and Respondent Isnora was standing to Sanchez's right. While Person D and Person B were yelling at each other, Person A approached and said, "Yo, let's fuck him up." Person A walked away a few feet and then

came back and repeated this remark. Person D did not respond verbally, but based on his training and experience Sanchez believed that Person D might be possibly armed. Sanchez explained that this belief was based on the fact that Person D was in a “serious argument with somebody twice his size, he didn’t back down and continued to argue with the guy, and he kept his hand inside his right jacket pocket the whole time that he was arguing with Person B.” At one point during the argument, Sanchez heard Person B state, “Yo, go get my gun.” Sanchez did not know at whom the statement was directed. After confirming that Respondent Isnora also heard Person B statement about the gun, Sanchez called Lieutenant Gary Napoli (the team leader). Sanchez told Napoli about what he had heard and then gave the phone to Respondent Isnora for Respondent Isnora to give Napoli “a description and a direction of flight.” Sanchez knew that Respondent Isnora was armed at the time because Respondent Isnora had told him so.

After the argument ended, Person B and the rest of the “^{Person A} ^{Person A} Party” (which now had approximately 15 people in it) began to walk away in an eastbound direction toward Liverpool Street. At no point did Sanchez see anybody from the party go back to see Person D who remained in front of the SUV in front of the club. Although one person from the party stayed behind to speak with the woman, that individual did not argue with Person D at all. While still on the phone with Napoli, Respondent Isnora began to follow the party, keeping a distance of approximately ten feet between himself and the party. As they were walking away, nobody in the party turned around to say anything in the direction of Person D. When asked about the rate at which the party was walking, Sanchez stated, “They were just walking, they weren’t running.” He did not hear any yelling or threats coming from them. Sanchez explained that he did not walk with Respondent

Isnora and follow the party because he (Sanchez) was waiting outside the club for the man with the White Sox hat who may have had a gun. He also wanted to keep an eye on Person D who may have also been armed.

When Sanchez saw a woman that he remembered from inside the club, he briefly engaged her in conversation to try to solicit a buy for prostitution. He explained that in addition to soliciting her for prostitution, he engaged the woman in conversation because he wanted to have a reason for being there, as he did not want to be obviously watching Person D. Sanchez meanwhile lost sight of Respondent Isnora. While he had a general concern for Respondent Isnora's safety, Sanchez had no indication that Respondent Isnora was planning on coming out of his role as an undercover. Sanchez believed that the threat of violence deescalated once Person B and his party walked away. He explained, "I believe it deescalated because they didn't get into the fist fight, Mr. Person A. Person A offered to beat him up [but] they didn't get into a fight, nobody else jumped him, he stayed calm in front of the club. Mr. Person B left without incident." Sanchez did not believe that Person B was going to come back to do a drive-by shooting, nor did he anticipate that Respondent Isnora was going to take police action.

Approximately five to seven minutes after Respondent Isnora left to follow Person B, Sanchez observed Person D get into the SUV, drive eastbound on 94 Avenue, and make a right turn onto Liverpool Street. Shortly after that, Sanchez saw the members of his field team drive by in two vehicles, traveling at a speed of 25 or 30 miles per hour. They were also going eastbound on 94 Avenue and made a right turn onto Liverpool Street. None of the team members acknowledged Sanchez, who at the time was standing in the middle of the block, approximately ten feet east of the club's entrance. Sanchez

started walking toward Liverpool Street. According to Sanchez, it was a "pretty long distance" from the club to Liverpool Street. As he approached the corner of 94 Avenue and Liverpool Street, he heard "loud voices, commands and authoritative tone of voice being yelled out." He could not hear specifically what was being said, nor did he recognize the voices. Three to four seconds later, he heard a "large crashing noise," which he believed to be the sound of a car stop taking place. He was not concerned at that point since "in [his] experience it's what happens when we are doing enforcement." When he heard shots, however, he ran to the southeast corner of the intersection. There he saw what appeared to be a silhouette of a person standing next to the side of the prisoner van. Although he did not see anybody with a weapon, he heard shots still being fired. From the safety of an open doorway, he called a team member, Detective Shannon Graham, and instructed her to "call patrol" to let responding officers know that the field team was there. He then called 911.

After uniformed officers responded to the scene, Sanchez walked to the middle of Liverpool Street, where he met the other members of his team. He did not have a conversation with Respondent Isnora at that time, but he saw that Respondent Isnora's shins were injured.

[DX 6A is a photograph of the front entrance of the Kalua Cabaret. Sanchez marked on it where he and Respondent Isnora were standing on the night of the incident. DX 6G is a photograph of the block of the club, facing westward on 94 Avenue. DX 6E is a photograph of the block of the club, facing eastward on 94 Avenue. Sanchez marked on it the location of Liverpool Street. DX 6U is a photograph of the southeast corner of 94 Avenue and Liverpool Street. DX 5A is a diagram of Liverpool Street between 94

and 95 Avenues. The diagram, which was created by the Crime Scene Unit, depicts the location of the vehicles at the time of the incident.]

On cross-examination, Sanchez testified that the atmosphere in the club was a lot rowdier than his previous visit there. The atmosphere made him feel uncomfortable and concerned for his safety. He did not have his gun on him since the club had a metal detector. He explained that it is the responsibility of a ghost to “relay to the field team the actions that the undercover takes throughout the course of the enforcement.” He confirmed that it is also the role of the ghost to protect the undercover and assist him in the event of a confrontation. In order to do that, the ghost should keep the undercover in sight as much as possible.

While inside the club, Respondent Isnora informed Sanchez that the man in the White Sox hat might have a gun. In addition to groping and grabbing, Sanchez saw an argument during which a man and woman threw glasses at each other. He also saw Person B acting boisterous while inside the club. He confirmed that he felt intimidated by some of the people at the club because they were “giving [him] hard stares.” Sanchez felt sufficiently concerned that he told Napoli to send Cooper inside.

Cooper and Respondent Isnora exited the club first, and Sanchez exited shortly after them. While outside, Respondent Isnora explained to Cooper and Sanchez how he had observed the man in the White Sox hat motion to his waistband. At one point, Sanchez went back inside the club to look for the man in the White Sox hat. When Sanchez exited the club again, Respondent Isnora informed him that he was now armed. Sanchez was still unarmed. They subsequently observed the argument between Person B and Person D. The argument became heated, but neither Person B nor Person D backed

down. Sanchez became exceedingly concerned. He considered Person B comment about getting the gun to be extraordinarily threatening.

Sanchez did not see Respondent Isnora turn around and look back while he followed the Person A Party down 94 Avenue. When Person D left, he drove at a high rate of speed down 94 Avenue in the same direction that the party had gone. Sanchez did not see where the party turned. By the time the field team drove by, Sanchez could no longer see Respondent Isnora on 94 Avenue. Sanchez conceded that even though he believed the situation deescalated once the party walked away, there was still a possibility that the party would come back to continue the confrontation. Sanchez did not know what took place immediately before he heard the loud crashing noise.

On re-direct examination, Sanchez clarified that he did not actually think that Person B was going to return to the club to reengage in a confrontation with Person D. Sanchez never heard Person B threaten to get his gun and then return to do a drive-by.

On re-cross examination, he clarified that at no point did Person D verbalize any threats, take out a weapon, or say anything about a gun. Person B was the only person present who mentioned a gun.

On re-direct examination, he explained that even though he did not hear Person D say anything about having a gun, he believed that Person D might be armed since Person D kept his hand inside his jacket pocket throughout the entire argument.

Inspector Michael Hurley

Hurley has been a member of the Department since 1984 and is currently assigned to Patrol Borough Manhattan North. He has a Bachelor of Arts degree from Fordham

University, a Master of Public Administration degree from John Jay College and a Juris Doctor degree from St. John's University. His previous assignments include the Neighborhood Stabilization Unit, the 1, 24, 30, 34, 44 and 47 Precincts, Narcotics Borough Manhattan North, IAB, Labor Relations and the Firearms and Tactics Section.

In 2005, Hurley was a deputy inspector and the commanding officer of the Firearms and Tactics Section. Prior to becoming involved in this case he did not, to the best of his recollection, know either Respondent. As commanding officer of the Firearms and Tactics Section he was responsible for all aspects of firearms and tactical training. Each year, two semiannual requalification cycles were conducted for all of the approximately 35,000 members of service. During his tenure, about 5,000 recruits were also trained. He is a certified New York State firearms instructor.

As the commanding officer of the Firearms and Tactics Section, Hurley served on the Chief of Department's Firearms Discharge Review Board (FDRB), which reviews all firearms discharges. The board is chaired by the Chief Department and includes the Chief of Personnel, the Deputy Commissioner of Legal Matters, the Deputy Commissioner of Training, and, on a rotating basis, a sitting bureau chief from one of the operational commands.

The board generally met monthly and would review a number of cases. They would review relevant documents, discuss and analyze the cases, and render findings and make recommendations. Hurley participated in approximately 50 boards and has reviewed about 600 shooting reports. Hurley also responded to serious police-involved shootings to provide any technical assistance and to see what information could be gathered for future training purposes.

The FDRB reviewed the instant case on October 19, 2010, and found that Respondent Carey's shooting was outside of Department guidelines in that he discharged his firearm in such a manner as to unnecessarily endanger innocent persons. Hurley explained that the terms inside or outside guidelines refer to whether a firearms discharge, intentional or accidental, meets the parameters set forth in Patrol Guide Procedure 203-12.

Hurley stated that Respondent Carey's statement at his official Department interview indicated that he did not see an actual person shooting at Respondent Isnora. He said the Respondent Carey indicated in his statement that he had an actual target, which was Person B. Respondent Carey, however, did not see Person B fire a weapon, he did not see anything in Person B hand resembling a weapon, he did not see Person B reach for anything, nor did he see a muzzle flash. Respondent Carey said that he was able to see the upper third of Person B body but that he did not see his hands at the time. As some point, he said he saw Person B leaning towards the driver, Person A. Hurley stated that this leaning was not consistent with Person B firing a weapon.

Describing what Respondent Carey said about the incident, Hurley recalled that he stated that he was in the passenger seat of the prisoner van and that he stepped out of the van, away from the door, because he felt it would not provide him with cover "and he stated he immediately fired three rounds." Hurley believed that Respondent Carey stated that, at that point, he realized that Respondent Isnora was in his line of fire, he ceased

firing and retreated to a position of cover behind the prisoner van.³ After that, all shooting ceased.

Hurley said that he concluded that Respondent Carey would have had to have fired through the windshield of the Person A vehicle. Person A had been the driver of the vehicle and Respondent Carey did not believe that Person A was firing a weapon. He said that any time one shoots into a vehicle, all of the occupants of the vehicle can be endangered, particularly when one is shooting through glass. Anything that comes in contact with the bullet, he said, can change trajectory and the angle of the bullet. Further, he noted that there is a possibility that the shots would not be accurate.

When asked if Respondent Carey's shots endangered other civilians or members of the service, Hurley stated, "Well, potentially he stated that he did state that he realized that police officer, excuse me, Detective Isnora appeared to be in his line of fire. Also based on the review of the crime scene sketch it appears that possibly other members of the service might have been in his line of fire as well." Regarding possible harm to innocent civilians, Hurley stated, "Well, Department guidelines state you know, an officer will not discharge his firearm when doing so unnecessarily endanger[s] innocent persons."

Hurley stated that Respondent Carey identified Person B as the target because that was who he saw Respondent Isnora firing at and he had seen the passenger window blown out. Respondent Carey had stated that he believed that Respondent Isnora was being fired upon. Hurley said that every officer has to make his own assessment as to

³ This is not exactly what Respondent Carey said during that interview. He said that Respondent Isnora was walking toward the vehicle and that he ceased firing because Respondent Isnora was walking into his line of fire (DX 4, p. 76).

whether there is a threat of imminent death or serious physical injury to himself or another. They do not base it solely on the actions or statement of another officer.

With regard to Respondent Isnora, Hurley said the FDRB determined that Respondent Isnora's shooting was outside of guidelines. Specifically, the board found that Respondent Isnora did not have probable cause to believe that the use of deadly physical force was necessary to prevent the imminent threat of death or serious physical injury to himself or another. The board also found that Respondent Isnora discharged his firearm in a manner which unnecessarily endangered the lives of innocent persons and that he discharged his firearm at a motor vehicle where there was no use of force other than by means of the vehicle itself.

Respondent Isnora's official Department interview transcript had a significant effect on the board's findings. Hurley said the board looked at the totality of circumstances and it appeared that Respondent Isnora's rationale for shooting appeared to be based on statements by Person B which were something like "get my gun," as well as his observation that Person B make an upward motion with his arm during the encounter with the vehicle. He said that Respondent Isnora had made a statement to the effect that he was not going to wait any longer to see if it was a gun and that was the point at which he began firing.

It was the opinion of the board that Respondent Isnora had not articulated the threshold necessary to show that he had a reasonable cause to believe that it was necessary to discharge his firearm at that point to protect himself or others from imminent death or serious physical injury. Hurley defined imminent to mean immediate, a threat that is not going to happen in the future, that something is going to happen

instantaneously. He said that the board felt that "viewing the totality of the circumstances that it was not reasonable for him to believe that."

Hurley stated that he did not believe the statement by Person B created an imminent threat of a drive-by because inherent in the statement was the fact that the gun was not there. When the statement was made, he said, the gun would have to be retrieved.

He said the finding was based on the totality of the circumstances. It appeared to be based on two factors; that the gun had to be located in another location and that, in regard to Person B raising his arm, Respondent Isnora's statement that he was not going to wait any longer to see if it was a gun. Hurley opined that, at the time Respondent Isnora pulled the trigger, he did not have enough information to use deadly physical force.

Hurley stated that officers are trained that a windshield can have a significant effect on the direction of a bullet and that it can cause it to travel in unknown directions. He agreed that bullets can ricochet. He noted that, in his statement, Respondent Carey stated that he did not know where Napoli was and he had lost sight of Oliver. Hurley did not recall if Respondent Carey stated that he knew Cooper or Headley's location.

On cross-examination, Hurley stated that he did not believe that the only reason Respondent Carey fired was because Respondent Isnora fired but he did note that there seemed to be some contradiction in Respondent Carey's statement. Hurley agreed that what must be determined is the totality of the circumstances known to the officer at the time he makes a decision to fire his weapon.

Hurley agreed that he had reviewed Respondent Carey's official Department interview. He agreed that Carey had been in the prisoner van and out of sight of the club. At that point in the testimony, a portion of the stipulation was read into the record which indicated that Cooper had notified Napoli, by phone, that there was a male wearing a White Sox hat in the club who was believed to be armed and that Napoli relayed that to the prisoner van. Hurley was also aware that Napoli's vehicle passed in front of Respondent Carey's van, which then followed Napoli's vehicle.

Hurley agreed that the Department regularly uses teams of officers and that officers are supposed to rely on other members of the team. He agreed that when Napoli informed them that there was a man with a gun, that was one thing they should consider. Hurley was aware that the Person A vehicle had stuck the prisoner van two times and that both of these strikes happened before Respondent Carey fired his weapon.

Hurley agreed that Respondent Carey had stated that after the Person A vehicle hit the wall, it could have turned south to avoid hitting the van a second time and thus left the scene. However, the driver of the vehicle chose to act in an extremely aggressive manner going at a high rate of speed and hitting the van two times. Testimony indicated that Respondent Carey saw Respondent Isnora on the street with his shield out yelling, "police don't move." It would have appeared that the occupants of the vehicle were not complying with police authority, and when there is a failure to comply with police directives, there is a heightened sense of awareness. Hurley also agreed that Respondent Carey's statement was that with all the rounds being fired, he believed someone was firing at Respondent Isnora. Respondent Carey did not believe he was being fired at and he was firing to protect another officer on his team.

Hurley also agreed that the windshield of the Person A car was blown out and there was no doubt that Respondent Isnora was firing at the Person A car, specifically at the passenger. Hurley agreed that when determining the totality of the circumstances, it is not one thing that must be considered when deciding what action to take, many things must be considered. He also agreed that Respondent Carey described Person B as a large man leaning over toward the driver who was being aggressive but Hurley did not agree that this was a suspicious motion on the part of Person B

Hurley agreed that whenever an officer fires a weapon, there is a potential that other people may be struck. However, the fact that other people are around does not prevent an officer from firing his weapon "provided that the action is reasonable." Shooting fewer rounds reduce the risk to innocent people.

Hurley stated that a post-shooting check of Respondent Carey's weapon indicated it had been fully loaded and capable of firing 16 rounds. There were 13 available rounds that Respondent Carey did not fire. He agreed that Respondent Carey stated that he stopped firing when he realized that Respondent Isnora was possibly in his line of fire and it sounded accurate that Respondent Carey had said that he stopped firing when Respondent Isnora moved toward the direction of his line of fire. Hurley agreed that he had testified that Respondent Carey said that he did not know where Napoli and Headley were. Respondent Carey said that they were not likely on the scene when he was firing and that where he was aiming, he did not see them. Respondent Carey did say that he saw Respondent Isnora and that he could see the occupants of the car.

Hurley asserted that if Respondent Carey did not know where other members of the team were, they were potentially in his line of fire. Hurley agreed that no other

members of the team were “immediately” near the ^{Person A} ^{Person A} vehicle; they were down the block. Hurley agreed that the only people near the vehicle were the three occupants and Respondent Isnora.

Hurley agreed that there is no rule that says an officer has to see a gun before he fires. Hurley explained that the officer has to have reasonable cause to believe that the use of deadly physical force is necessary to protect himself from imminent death or serious physical injury. He agreed that guidelines are just that and that each situation has to be decided individually on the facts known at the given time.

On further cross-examination, Hurley agreed that some rules regarding firing are “black and white,” such as no firing warning shots, using deadly physical force to defend property, or cocking one’s firearm. However, other provisions require more interpretation that it is not a strict yes or no. He agreed that the officer has to make the first determination, obviously. When asked to define the term “fluid” he explained that it meant that a situation might be subject to change; it is not static, it is in motion.

Hurley agreed that officers are not discouraged from firing when firing is necessary and justified, and he added that, if it is justified, the Department wants them to protect themselves whatever way is reasonable. He stated that the student guide stresses to officers that even though innocent persons may be subject to risk, if it is necessary under the circumstance, deadly physical force can be utilized “where it is necessary.”

Hurley agreed that the concept was “reasonableness.” Many factors go into the decision regarding whether use of force is reasonable under the circumstances. There

could be situations where it would be reasonable for an officer to use deadly physical force even though he or she has not seen a firearm.

Hurley agreed that during his tenure at the Firearms and Tactics Section, some changes were made in the training regarding the use of deadly physical force with the hope of improvement in that training. He agreed that the Patrol Guide provisions are part of the student guide which recruits are taught.

Discussing the rule regarding firing on a moving vehicle, Hurley stated that if deadly physical force other than the vehicle is being used, that would negate the provision. Hurley agreed that the rule prohibits an officer from firing at a vehicle that is coming straight at him if he does not see anyone raising a firearm at him. But he noted the officer can use deadly physical force to prevent the use of deadly physical force against him other than the vehicle itself.

Hurley agreed that Respondent Isnora had stated that he believed Person B was about to raise a firearm and kill either him or another member of the field team. He agreed that an officer might consider how a threat is made as a factor to be considered. Respondent Isnora followed the group and, at that point, Respondent Isnora wanted to prevent a drive-by. He agreed that Respondent Isnora said he had his shield on his collar and he told the occupants of the car that he was the police and they were not to move. The car came forward and knocked Respondent Isnora to the side but not off his feet. Hurley agreed this could be a factor for the officer to consider. He agreed that Respondent Isnora did not fire at that point, nor he did fire when the car struck the prisoner van, nor when the car crashed into the gated area of the wall. Asked if this

demonstrated restraint, Hurley stated, "I don't feel at that point in time he had justification to discharge his weapon under the Department guidelines."

Hurley indicated that there is nothing to indicate that Respondent Isnora acted with malice; Respondent Isnora made a judgment call and that it was a split second decision.

On re-direct examination, Hurley agreed that he had read the transcripts of the official Department interviews of Respondent Isnora and Respondent Carey. Everything must be judged on a scale of reasonableness. Based on everything he read, he did not believe that Respondent Isnora's decision to discharge his firearm when he did was reasonable. He noted that it is reasonable for an officer to shoot if he reasonably believes what the occupant of the vehicle is pointing in his direction something that would be capable of discharging a round.

Hurley agreed that Respondent Carey had been told that the armed person was called "White Sox hat" and there was never any other description given of "White Sox hat." [At this point, three crime scene photographs (DX 6I, 6K and 6O) were placed into evidence.]

Deputy Chief Kevin Ward

Ward been with the Department for approximately 27 years and is presently the executive officer of OCCB. He has a Bachelor degree from John Jay College, a Master of Public Administration degree from Harvard University and Juris Doctor degree from New York Law School. He has worked in various commands, including Midtown

Precincts North and South, the 9, 17, 84, and 94 Precincts, IAB and the OCCB Investigations Unit.

When Ward was notified of the shooting in the instant case, he went to the scene at Liverpool Street between 94 and 95 Avenues. He sat in on the interviews of all members of the service who did not fire any rounds that day. CEU was part of OCCB and CEU's purpose was to target clubs throughout the five boroughs that had community complaints about violence, narcotics trafficking, prostitution, gambling and other criminal activity.

The officers who fired their weapons were Headley, Cooper, Oliver, Respondent Isnora and Respondent Carey. Respondent Isnora, who Ward did not know personally, was assigned to the Narcotics Division of OCCB in February 2005 and he received training at that time which included a three-week course consisting of classroom lectures, simulations in the Urban Training Center Tactical Village and fieldwork.

The classroom training, Ward said, included enforcement and investigations. Officers learned about interpersonal skills, observational skills, cover-story development, planning, administrative matters such as documentation, and the use of equipment available to them.

He noted that OCCB assignments can be very dangerous and undercover work can be even more dangerous because the undercovers sometimes do not have a vest, gun or shield. The undercovers go through OCCB training where the instructors are former undercovers or former investigators and undercover safety is also discussed in detail.

Regarding the "Role of the Undercover" lesson plan (DX 8), Ward stated that every newly assigned undercover is given this training and when Respondent Isnora

entered OCCB in 2005, he would have received this training. It deals with undercover safety and goes over critical factors, principals and fundamentals that should be followed in every undercover operation, based on examination and analysis of prior incidents in which undercovers were either killed or injured. He noted that these problems consistently come up when there is an operation that does not go according to plan.

Ward explained that if an undercover is “playing a good role, if he is good at his job, they have no idea that he is a member of the service.” He noted that criminals routinely rob, shoot, and assault each other and there is a danger that an undercover may be the victim of a robbery or may be forced to do drugs. This can sometime occur behind locked doors and there can be a very dangerous situation.

As per the lesson plan, Ward noted the seven critical factors that lead to undercover violence: Poor or inefficient operational or tactical plan; arrest from an undercover posture; mismanagement of flash roll or buy money; no or poor means of communication; complacency by the undercover or the field team; poor access or no accessibility to weapon; inaccurate conclusions to observations and failure to pick up on danger signs or overreacting to danger signs.

Ward explained that before going out to the field there is supposed to be a TAC plan and all members of the team are supposed to be at a TAC meeting. They are supposed to learn what the undercovers will look like in the field. They should also go over the history of the location and information about known subjects. They should discuss communications wearing a Kel as well as the TAC frequency to be used. He explained that communications involving the undercover, the field team and the team leader are important. To the best degree possible, this should be in real time to determine

how a situation is developing. Ward discussed the use of the Kel and the fact that a distress signal could be prearranged.

With regard to inaccurate conclusions to observations and failure to pick up on danger signs or overreacting to danger signs, Ward explained that unexpected things can happen and that might lead an officer to believe that something different is going on and that things may heat up. As to overreacting, Ward gave the example of an undercover asked to do drugs. He explained that he should have an excuse ready so that he would not have to come out of his role.

On arrest from an undercover posture, Ward explained that, under the team concept, everyone has a role to play. There is the team leader, the arresting officer, the prisoner van, the apprehension team or chase car. There are also the undercovers and ghosts. The ghosts are to watch the undercover. He noted that it is different than being on patrol, where if a police officer sees something, he is going to take action and apprehend, arrest and process that person. In their training, undercovers have to learn that that is not their role anymore.

Ward explained that an undercover is doing a good job when he has thoroughly convinced the other person that he is not only not a police officer but is the exact opposite of a police officer, a person involved in criminal activity. Both the undercover and the other person know people who buy and sell drugs. Drug dealers often get robbed because they have money. He noted that if an undercover dealing with a person buying drugs or engaged in prostitution were to turn around and try to make an arrest, to pull out his weapon, the person they are dealing with would believe that they are being ripped off.

This would create a dangerous situation, he explained, because the person who feels he is being robbed is going to protect himself and might shoot the undercover or try to flee.

Describing the undercover role, Ward stated, “

With regard to an undercover's ability to make an arrest, he noted that undercovers do not carry handcuffs, they usually do not have on a vest, and they may not have a shield. They are usually alone but there is "hopefully" a ghost in eyeshot so that if they make an arrest, there is superior force.

With regard to being identified as a police officer, Ward stated:

He could have his shield you know, which should be identifiable but he doesn't have anything else...if you have your gun people are going to notice your gun and they don't your shield and the other thing too is you just sold yourself as not being a police officer so everybody around there you know, they don't think you are a police officer and you know, so if you pull out the gun they are going to see the gun first that is just normal.

Undercovers, he agreed, do not wear raid jackets or gun belts. He also agreed that the basic principles under which members of the service may use deadly physical force apply to undercovers.

Regarding the "Confrontation Situations and Conflict Resolutions" lesson plan (DX 7), Ward explained that confrontation involves members of the service, that is, a challenging officer and an officer being challenged. There are two officers in the street; one in plainclothes, maybe both in plainclothes, and one is being challenged as not being a member of the service. They may be taking enforcement action and the challenging officer does not realize that the other person is a member of the service. The person being confronted has the responsibility to clearly identify himself and to remain motionless and listen to directions given by the challenging officer. He then has to produce identification and, if necessary, let the person being apprehended go. This is done because the Department has had several tragedies where a member of the service has fired on another member of the service.

The portion of the lesson plan that concerns interacting with non-members of the service states: "Do not engage in a verbal or physical altercation. Leave the location if possible. Use a distress signal when necessary." Ward explained that the object is to deescalate the situation, to bring the confrontation down. He gave an example of someone in a building who comes out of his apartment and tells the undercover to get out. The undercover is supposed to deescalate and leave. He noted that police officers are trained to take charge and not back down, but an undercover has to suppress that and should attempt not to engage.

Ward was not present at Respondent Isnora's official Department interview, but had read the transcript of the interview. Ward indicated that when Respondent Isnora first left the Kalua Club, he went with Cooper to the undercover vehicle and were going to look for the individual in the club wearing the White Sox hat who may have had a

weapon. When Respondent Isnora got to the vehicle, he realized that Sanchez was not ghosting him and he retrieved his gun and shield and went back to the club. Ward indicated that an undercover can carry his weapon at his discretion. He said the rule has slightly changed since this incident and now the members of the team must make clear at the TAC meeting that the undercover would not be armed. Ward agreed that when Respondent Isnora took his firearm and shield, that was consistent with his OCCB training. Ward noted that Respondent Isnora did not come out of his undercover role when he retrieved his firearm and shield, nor did he step out of his role when he went back to the front of the Kalua Club.

Ward noted that Respondent Isnora said in his interview that he saw a black SUV pull up at the same time as a group of eight to ten patrons exited the club. There was a verbal dispute, the male from the SUV kept his hand in his pocket and one of the members of the group, Person B said “go get my gun.” Person A then made a reference to beating the man up. Sanchez called the team leader on his cell phone, then gave the phone to Respondent Isnora. Ward agreed that, to this point, Respondent Isnora’s actions were consistent with his undercover training. He noted that there was no imminent threat to use a weapon, it did not seem like there would be an incident right then and there, and the training required them to notify the field team while maintaining the undercover role.

Ward noted that if Respondent Isnora had come out of his role at that point, it would have been inappropriate as there was no action connected with the words “go get my gun.” No one, for instance, went over to a garbage can looking for a gun and there were no other objective factors indicating that this was “moving up.” Additionally, while

Respondent Isnora had his firearm, he did not have his vest or handcuffs and the other undercover with him was unarmed.

According to Ward, as Respondent Isnora was following the group up 94 Avenue, there was no imminent threat posed by the group:

At that point the group is walking off, according the GO-15 there is no escalating facts. We don't see any member of the group continue to talk or yell things, we don't see them walking down the -- running down the block or waking briskly down the block, we don't see anybody breaking off to look for a weapon in a garbage can so this point there is no additional objective facts coming up that made you believe that this incident was escalating at this point.

Ward noted that, according to his statement, Respondent Isnora took out his shield and clipped it to his collar before reaching Liverpool Street. He said the significance of this was that Respondent Isnora came out of his role as an undercover and that this was not consistent with his training. He explained:

There was no threat of violence, he notified the field team he was keeping them under observation they were walking away from the scene. At this point he had a verbal argument in front of the club, we had no weapon seen, we had no additional facts come in to light the situation seems to be de-escalating. He's notified the field team he believes or I shouldn't say believes, the field team is aware of this and likely responding to the scene and he was given directions to keep them under observation.

Ward noted that Respondent Isnora stated that, as he turned the corner of Liverpool Street, he observed three men get into a car and he took his gun from his pocket and put it at his side. When asked if this was consistent with his training, Ward stated that he had already come out of role. Ward recalled that Respondent Isnora said that he crossed the street and "engaged the vehicle." By that, he meant that Respondent Isnora pulled up his firearm and got in front of the vehicle with his shield on his collar.

When asked if there was a threat of violence when Respondent Isnora turned the corner, Ward replied, "No, nothing has changed since the verbal statement in front of the club that would escalate the situation. It remained the same from the front of the club to that point." Ward asserted Respondent Isnora's approach of the Person A car was not consistent with his undercover training. He explained:

He should have notified try to make contact with the field team. Again, the field team was notified, the field team was responding it's the job of the field team to stop that vehicle. At this point we still had a stop, there was no arrestable situation, there was no facts had been going any higher⁴ to believe that some violence was imminent at that point.

Ward noted that, if the field team was unavailable, then Respondent Isnora should have kept the car under observation. He could have done this by going back to the corner: "His job at that point was to keep the subjects under observation."

On cross-examination, Ward agreed that he had been an undercover in 1985 for about 60 days, which was not very long. He had made undercover narcotics buys but did not recall how many. Ward agreed that he had very little training to be an undercover in 1985 and that training was almost nonexistent at that time.

Ward agreed that an undercover needs good observation skills. When asked if an undercover needs to bring intuition and street sense to his work, Ward did not agree that intuition was a factor. He qualified street sense by stating that it had to be based on something articulable and an officer's experience of observing something specific. He agreed that undercover work is one of the most dangerous assignments in the Department and that undercover units are actively engaged in enforcement.

⁴ As in transcript.

Ward had not seen a scenario like the one he read about in Respondent Isnora's official Department interview. He agreed the undercovers have to adapt to unusual and unanticipated situations. The role of the ghost is to watch the undercover and Respondent Isnora went back to the Kalua Club because he did not see his ghost.

Ward agreed that an undercover could come out of his role if, but for his action, someone would be harmed. Ward agreed that during Respondent Isnora's official Department interview relating to the confrontation outside the club, he indicated that the parties were highly agitated and angry, and Person B said "get my gun" in a firm voice. Additionally, Person A said "let[']s fuck him up," referring to Person D. Ward also agreed that there was testimony that Person D was standing there with his hand in his jacket pocket and that it was believed that he may have had a gun. He agreed that, according to Respondent Isnora's interview, Sanchez called the lieutenant as a result of this incident and Respondent Isnora was instructed to follow the group.

Ward agreed that Respondent Isnora said that he was concerned that there would be a drive-by shooting. Ward also agreed that it was a possibility that the party was walking off to get a gun. While undercovers are also police officers sworn to protect the public and to take police action when they believe it is necessary to do so, Ward disagreed, however, with the notion that an undercover has to do that. Ward stated that an undercover will observe activity that a normal police officer in uniform or enforcement in anticrime would immediately act on. Undercovers are trained not to act and he noted that it is difficult for an officer to restrain his "natural police instinct" but that is what an undercover has to do at times. He agreed that there are circumstances so

extreme that an undercover is justified in coming out of his role and taking enforcement action.

Ward did not see the following excerpt from the Vice Enforcement Manual Procedure 20-10 [Respondent's Exhibit (RX) A] as a "standard" for when an undercover could come out his role:

Undercover officers should not take enforcement action unless their safety or that of another is jeopardized. If the undercover's identity has been or appears to be compromised he should retreat from location and they should notify the field team of the circumstances.

He agreed that the procedure did not make use of the term "deadly physical force."

When asked if it was his opinion that the scenario related by Respondent Isnora was sufficient basis for Respondent Isnora to come out of his undercover role, Ward answered, "No." He explained:

The statement was go get the gun so in fact the gun was not present, by the mere statement and his role is to notify the field team, which he did, and the field team is to respond. What we train the undercovers to do if he interjects at that point he is putting himself in more danger. There is ten people on one side there is another person in the car who may have a gun, he is going to come out of his role as an undercover at that point without a vest on and the partner doesn't have a gun or a vest and we are going to elevate the situation.

Regarding Respondent Isnora's knowledge of the field team, Ward stated that he knew that Cooper had gone to the team leader's car and that, while he did not know the exact location of the field team, he did know that the field team was in close proximity to the location.

On re-direct examination, Ward agreed that Respondent Isnora came to OCCB through the Narcotics Division and would have been trained in undercover narcotics procedures. He would not necessarily have been trained for vice enforcement.

Ward reiterated that, based on the facts presented, Respondent Isnora should not have come out of his undercover role. He noted that an undercover's assessment that imminent violence is going to be used against himself or others has to be grounded in "reasonably articulable objective facts." He said that did not exist in this case because there was nothing besides the verbal statements at the club, nothing more had come into play. He added, "There was nothing in the testimony regarding running or walking briskly or going into their waistband or going to a place where a gun could be secreted. Nothing changed in the testimony from the incident in front of the club during the walk down 94th Avenue."

On re-cross examination, Ward affirmed that he had stated that there was no further indication that the Person A group were on their way to get a gun, such as walking fast. Ward had not read Respondent Isnora's Grand Jury testimony [RX B is the transcript of Respondent Isnora's Grand Jury testimony] but he had read the official Department interview and the "shooting 49" [the Department memorandum from the Chief of Department to the Police Commissioner containing the FDRB's findings].

Respondents' Case

Respondents called Undercover Officer No. 0178 as a witness and testified in their own behalf.

Undercover No. 0178

Undercover No. 0178 (UC 178), a 21-year member of the Department, is currently assigned to the Alcohol, Tobacco and Firearms Task Force in an undercover capacity. His previous assignments include the Narcotics Division, Bronx Homicide Task Force, Training Investigation Review Section, Firearms Investigation Unit, and Joint Firearms Task Force. In total, he has spent 19 years as an undercover. While assigned to training, his job has been to instruct undercover investigators and supervisors on how to do undercover work. Some specific undercover areas in which he provides training are buy and bust operations, basic surveillance, firearms investigations, and confrontation situations. He has completed the Department's Methods of Instruction Course, as well as the Federal Bureau of Investigation's Instructor Development Course. UC 178, the Department's senior undercover, was deemed an expert in the roles, duties, training, and function of an undercover.

UC 178 described the job of an undercover as the most difficult and probably the most dangerous assignment in the Department. He explained undercover work:

It takes very special people to be undercovers... You have to be ready for anything, ready to adapt to whatever that's set before you... Your powers of perception have to be extremely sharp. You want to be able to perceive danger before it happens. You have to have good observation skills, good judgment, discretion. There are a lot of things that go into the building or ingredients, so to speak, in terms of the development of an undercover. And those characteristics have to all come together to make the complete undercover, or to create the professional undercover.

UC 178 trains undercovers on when they can come out of role to take police action. He explained that because the undercover role is unique and distinct from the

other members of the field team, undercovers are discouraged from taking action in arrest situations. For one reason, they do not have the proper tools to effect an arrest. For example, they may not have handcuffs, a bulletproof vest, or identification that would lead somebody to believe they are law enforcement. Another reason for discouraging undercovers from taking action is that undercover work requires a different way of thinking, and it is difficult for an undercover to take on both the undercover role and the arresting officer role at the same time. UC 178 provided an exception to this rule:

So what we train them is that when you have a designation of an undercover, you're just doing undercover work and you should not come out of role to try to effect any type of arrest unless certain things are in play, certain things are about to happen; specifically, that being if someone is about to get hurt, and we are talking about seriously hurt or killed, whether it be the public, whether it be the undercover himself, or whether it be supporting members of his team, it's expected that the undercover take some type of action, and that's the only exception to the rule.

When determining whether or not to come out of role, an undercover has to use his judgment and discretion based on the circumstances that are set before him. If somebody is about to get shot or killed, an undercover has to prevent it from happening. The undercover will not want to wait too long because if the killing or shooting takes place, the undercover will have failed in his duties as a police officer. This is true even when the field team is not immediately available. He explained that while it is nice to have backup, in situations where somebody is going to get killed, an undercover is expected to take action even when nobody else is around.

At one point, UC 178 trained Respondent Isnora. While they may have seen each other again at an annual refresher course, they do not have any sort of social

relationship. Respondent Isnora's attorney presented UC 178 with the following hypothetical situation:

It is approximately 3:30 or 4:00 a.m. in November of 2006. And at that time, Undercover Detective Gescard Isnora has just exited a strip club known as Kalua. He has been inside that location for approximately two hours prior as part of his work in the Club Initiative Task Force and was attempting to solicit prostitution and/or the purchase of drugs. Clientele in the club had been physically aggressive toward the dancers, and a number of arguments had taken place.

Detective Isnora had also witnessed during an interaction between a female dancer and a man in a White Sox hat where in Detective Isnora's presence, the White Sox male took the dancer's hand, placed it on his hip, and told her not to be concerned with a bothersome patron, and further stated that he would "take care of him" if he bothered the dancer again. Detective Isnora concluded after observing that encounter and seeing what he believed to be a bulge on the hip of the male with the White Sox hat, that White Sox may have been in possession of a gun.

Assume further that after exiting the club at approximately 3:30 or 4:00 a.m., Detective Isnora retrieved his gun and returned to the front of the club to await White Sox' exit from the club. While standing in front of the club with his ghost, Hispolito Sanchez, both men observed an intense, heated, verbal dispute erupt between a man known as Person D [REDACTED] Person D on the one hand and a group of patrons who had just exited the club known as the Person A [REDACTED] Person A group on the other hand.

Further assume that during the course of this heated exchange, one of the Person A [REDACTED] Person A group members, a man known as Person B [REDACTED] while arguing with Person D [REDACTED] exclaimed to members of his group, "We'll get the gat. We'll get the gat." He does so emphatically and loudly. While Person D [REDACTED] stands his ground with a hand inside his jacket, leaving the detectives to conclude that he had a weapon, the Person B [REDACTED] group begins to walk east on 94th Avenue, and a member of that group, later known as Person A [REDACTED] turns toward Person D [REDACTED] and in a loud voice says, "Let's fuck him up. Let's fuck him up." At some point during this argument, Sanchez is

concerned enough as to what he observes that he calls the team leader and relates what is taking place.

The group then begins to walk east on 94th Avenue at a fast pace. Assume further that the team leader has instructed Isnora to follow the group and that Isnora sets out after the group, keeping a distance and staying ten to 20 feet behind them. His ghost has failed to follow Isnora, and instead remains in the vicinity of the club. As the group nears the corner of 94th Avenue, a few of the group remain on the corner, and three members of the group including Person A and Person B turn the corner onto Liverpool Street and are observed by Isnora entering an auto which is parked on the east side of Liverpool Street facing 94th Avenue, the same street the Kalua Club is located on, with its lights and engine on.

Assume further that based upon Isnora's observation up to that time, he forms the belief that Person A and Person B are retrieving a weapon and intend upon immediately returning to the front of the club and shooting Person D where Isnora last observed Person D before walking up 4th Avenue.

Based on this hypothetical, UC 178 testified that it would be appropriate for Respondent Isnora to place his shield on his collar. Respondent Isnora displaying his shield would show his understanding that a confrontation between him and responding uniformed members of the service was possible. It would also show a desire to ensure that the people with whom he was going to interact knew that he was the police so that they would comply with his instructions. As for Respondent Isnora covering his shield with his hand at first, UC 178 understood tactically why Respondent Isnora would want to cover his shield from members of the group that might be lookouts looking down the block to see if Person D was still there. It was understandable that Respondent Isnora would cover his shield until he got closer to the car where the gun was located.

The hypothetical continued:

Assume further that as Isnora observes the Person A auto, lights on and engine on, he determines that the auto is about to leave its parking place and head back to Kalua. He begins to cross Liverpool Street, and as he does, the auto with members of the field team pass him by and do not stop until they are 30 to 40 feet down the road from the Person A auto.

Based on the scenario, UC 178 testified that Respondent Isnora would be justified according to undercover guidelines in coming out of his role and taking police action. He explained that Respondent Isnora would have to intervene at this particular point because once the Person A vehicle started to move it would be physically impossible to stop it. This would, therefore, be the logical moment for Respondent Isnora to approach the individuals, identify himself, and take whatever action he wanted to take until the field team could get there.

The hypothetical continued:

Assume further that Isnora determines there is no cover reasonably close to the Person A auto, backup is not close enough to assist, and the Person A auto is instantaneously about to depart for Kalua. He walks in front of the auto, shield out, firearm raised, and in a loud voice command, "Police, don't move. Police, don't move," in a final attempt to stop the auto.

UC 178 testified that, under the circumstances, Respondent Isnora's tactics would be justifiable under the guidelines since the Person A vehicle was about to pull out and Respondent Isnora believed that the individuals inside the car were going back to the club to harm Person D. While Respondent Isnora stepping in front of the car might not be the smartest thing to do, UC 178 did not see it as a violation of any guidelines. He compared it to a police officer running into a burning building in the sense that putting oneself in harm's way is what law enforcement officers do everyday to protect life.

On cross-examination, UC 178 agreed that an undercover is trained to blend in with the subjects on a set. If an undercover is adept at blending in, the subjects will believe that he is one of them. If he is not successful at blending in, it could pose a dangerous situation. It is a general rule that an undercover who has blended in cannot then become an apprehending officer. In situations where there has been an exchange of money for contraband, an undercover who does not have any "identifying tools" and returns to take police action might be confused for somebody who has come back to cause harm or steal. A suspect who believes he is about to be stolen from might attempt to fight or flee. An undercover can identify himself to a suspect by displaying his shield and Department identification card or by putting on a raid jacket. If an undercover does not have these tools available, he can identify himself by announcing that he is a police officer.

UC 178 trains undercovers that communication is important. Poor communication can lead to dangerous situations. [REDACTED]

A series of nine horizontal black bars of varying lengths, decreasing from left to right. The bars are evenly spaced vertically and have a thin white border.

[REDACTED]

If the undercover is on the phone with his team leader and senses that there might be something happening, he has to use his judgment to determine whether to jump out of role. There would have to be an articulable threat. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Based on Person B comment about getting the “gat” (or gun), it would be reasonable to believe that the gun was not, at that point, in Person B reachable, lungeable area. When asked if anything subsequently happened to heighten Respondent Isnora’s sense of awareness that violence was about to happen, UC 178 provided the following response:

Based on the conversation that he heard, go get the gun, and one of the individuals responding that they were going to mess this guy up, coupled with the fact that they were walking off leaving the location, and according to the scenario they were moving at a quick pace or quickly, I think it’s reasonable for someone to conclude that they are going to get this gun.

UC 178 agreed that even without specifically hearing that the gun was in the car, that would be a reasonable conclusion to reach. As the group walked down 94 Avenue, however, it was unknown where the car was parked. The group could have been walking to the train station or to hail a cab. UC 178 did not see the sense of Respondent Isnora being on the cell phone if he was not relaying to his team leader what was going on. According to UC 178, even though the walk to the corner would have created distance

between the parties, the threat would not have necessarily deescalated. He agreed that at the time that Respondent Isnora clipped his shield to his collar, no gun had been seen. It was not known where the group was going or whether Person D was still in front of the club. (He conceded that Respondent Isnora could have looked back to see if Person D was still there, so long as looking back did not place him in jeopardy or bring attention to himself.) UC 178, nevertheless, disagreed with the statement that Respondent Isnora came out of role unnecessarily at that point:

I don't know of anywhere in our training where we tell anybody a gun must be visible in order for you to identify yourself. I have never trained anybody in that. If you perceive a threat, whatever the threat...may be that you perceive, it would be up to that individual, in this particular case that detective, to articulate the threat and use his judgment and discretion and take whatever actions he is going to take

An undercover has to use his judgment and discretion in deciding whether to come out of role. In his training, UC 178 teaches that sometimes undercovers overreact or underreact to danger signs. While both overreacting and underreacting can result in dangerous situations, the training on this topic focuses on specific scenarios and is not meant to be "utilized across the board."

UC 178 was asked to assume that Sanchez, the ghost, was an experienced undercover who was working with a less seasoned undercover; that Sanchez remained in front of the club to observe a man who might have a gun and wait for a second man still inside the club who might also have a firearm; and that Sanchez believed the threat deescalated when the group left the area and walked down 94 Avenue. When asked how Respondent Isnora and Sanchez could have differing perceptions of the same situation, UC 178 explained that undercovers can have different perceptions based on where they

are standing, how long they have been doing undercover work, and where they have worked before. He conceded that sometimes perception can be skewed. Some undercovers are better at it than others.

On re-direct examination, UC 178 agreed that shouting, "Stop. Police," and displaying a shield on one's outermost garment are two ways that an undercover can identify himself when electing to come out of role. Based on the hypothetical scenario presented to him, he did not believe that Respondent Isnora overreacted to the situation he observed.

On re-cross examination, UC 178 was asked to assume that Respondent Isnora was wearing the same clothes when he approached the car with his gun drawn as he had been wearing while at the club. (Unlike at the club, though, his shield was attached to his collar when he approached the car.) UC 178 disagreed with the assertion that Respondent Isnora would not be readily identifiable as a police officer.

Respondent Isnora

Respondent Isnora, a ten-year member of the Department, is currently assigned to Patrol Borough Brooklyn North. In 2005, after attending a 30-day training course for undercovers, he started working as an undercover in Narcotics Borough Brooklyn North. While there, he at times needed to come out of his undercover role. He explained that "it's not uncommon for undercovers to come out of their role when it pertains to imminent danger, whether it be themselves or their partner." He gave two examples. The first was a time that two men attempted to rob him during the course of a drug buy operation. When one of the men clenched toward his waistband as if he had a gun,

Respondent Isnora retrieved his firearm and identified himself as a police officer. A fight ensued and Respondent Isnora ended up sustaining a broken hand. Another example was a time that he was the ghost and the undercover that he was watching failed to come out of a building. He ran into the building to make sure the undercover was all right. Once inside the building, he encountered a man with a knife. Although Respondent Isnora was armed at the time, he did not discharge his weapon. He has never before been the subject of Department charges, nor had he ever fired his gun in the line of duty before this incident.

The Monday before Thanksgiving 2006, while assigned to CEU, Respondent Isnora visited the Kalua Club for the first time. On that occasion, he conducted a drug purchase inside the club, and as a result two women were arrested. Only a few days had passed when he returned to the club on November 24, 2006, and he entered the club only after Sanchez confirmed that the two women who had been arrested were not present. Because he had been searched the first time he went to the club, this time he left his shield and firearm inside the car with Edness or Graham.

Once inside the club, Respondent Isnora walked to the bar. The club was crowded and loud, and he saw the male patrons acting aggressively toward the females. He engaged in small talk with a couple of women in an attempt to solicit them for purposes of prostitution. While a third woman approached Respondent Isnora, a male patron tugged at her arm. The woman complained to Respondent Isnora that the man was harassing her, and she proceeded to summon from the entrance of the club a man with a White Sox hat. When she told the man with the hat about the man who had grabbed her, the man with the hat took her hand and placed it around his waistband area. Respondent

Isnora saw a slight bulge near that area. After this interaction took place, Respondent Isnora told Cooper about it. Cooper in turn relayed the information to Napoli via cell phone. [DX 6B, 6C, and 6D are photographs of the inside of the club. They depict the club's bar and stage area.]

Ten or 15 minutes later, Respondent Isnora and Cooper exited the club and walked to the corner. Respondent Isnora looked back and realized that Sanchez was not around. He became concerned for Sanchez's safety, so he retrieved his firearm and shield from the car and then returned to the club. A few feet east of the entrance he saw Person D leaning against the SUV. Meanwhile, Sanchez came out of the club. The detectives observed a woman exit the club followed by the Person A Party. The woman told the party that she was "not going to fuck all y'all," and Person D became agitated. Person D proceeded to say something to the party, triggering a loud and violent response from Person B. Person B stated, "Go get my gun, go get my gun," followed by Person A stating, "Let's fuck him up, let's fuck him up." Sanchez called Napoli to report what was happening and then gave the phone to Respondent Isnora. Respondent Isnora gave Napoli the party description and direction of flight, and Napoli instructed him to follow the party. Respondent Isnora explained that Person B's comment about getting a gun was not something one would say in the street in a joking or playful manner. He continued, "Given the fact, you know, you can take into account where you grew up, you don't hear that stuff playfully. If you say it, chances are you are going to do it. To my understanding, that's what was going to happen. He was going to get his gun." He also explained that Napoli's instruction to follow the party was not an uncommon practice, as it is done all the time in buy operations.

Respondent Isnora gave the phone back to Sanchez and followed the Person A Party, which was walking “in a quick manner” down 94 Avenue toward Liverpool Street. Describing the party’s pace, Respondent Isnora stated, “It wasn’t just walking like they were going to go home. They were going back for Person D No doubt in my mind.” He believed at the time that the field team would arrive and stop the party before it reached the corner. He was not planning on effecting an arrest, as he understood that his role was “just to see where they were going and in the hope that the field team [would] get there in time.” When he reached the corner and the field team was not yet there, he took out his shield and placed it on his outermost garment. He clasped the shield with his hand, though, because he did not want anyone to know who he was. When he turned the corner, he saw two individuals on the corner. He believed that these individuals were the lookouts for the party, similar to lookouts who relay an alert that police are in the area during buy and bust operations. When he passed the possible lookouts, he took his hand off of his shield. He saw Person A Person B and Person C hurry into a vehicle, which was located directly under a streetlight. This all occurred within three minutes of the heated argument that had taken place with Person D in front of the club.

Respondent Isnora reached for his firearm. While doing so, he saw Napoli’s car drive past him, leading him to believe that the field team did not see him. The engine of Person A car was running and the headlights were on, and Respondent Isnora decided at that point that he should quickly get to Person A car to prevent Person A and Person B from returning to the club where Person D and Sanchez were standing. Respondent Isnora approached the car “in a hurried fashion because [he] understood the nature of what just happened, and basically the culmination of the heated argument and the propensity as to what’s going to

happen right then and there." He had his firearm "right in front of the car" and he identified himself by stating in a very loud voice, "Police. Don't move." The area was lit, and it would have been hard not to see his shield, which he was wearing on his collar.

Respondent Isnora was standing a foot from the front of the car, and he saw Person B in the passenger's seat. He focused his attention on Person B because it was Person B who had made the comment about getting a gun. Within seconds, the car drove into his legs, and he fell onto the hood. The car then struck the prisoner van. Respondent Isnora moved to the side of the vehicle, but the car started racing back toward him. The rear of the car then struck a gate. This all happened quickly, but all the while Respondent Isnora maintained his vision on the passenger's side of the vehicle. When he saw Person B reach for something and then bring up his arm, Respondent Isnora yelled, "Gun," and fired his firearm "at the car center mass of the individual." After the fact, he realized that he fired all of the rounds in his weapon. He explained that although he did not see what was in Person B hand, he fired because he was not going to wait for Person B to bring up a gun. By then it would have been too late.

On cross-examination, Respondent Isnora testified that although undercover training includes role playing scenarios that an undercover might encounter, an undercover at work is "not bound by that because...environments change, people...you have to adapt along with it." He agreed that he learned in training that communication is a critical factor, that the field team needs real-time information as to how everything is playing out so that the team leader can know if the level of violence against an undercover is escalating. He also learned that an undercover should try to deescalate violent situations whenever possible and should not overreact to signs of danger. Not

overreacting involves using good judgment. Respondent Isnora was promoted to detective in August 2006. Shortly after that, he requested to go back on patrol because he did not want to buy drugs anymore.

Respondent Isnora was wearing blue jeans, a hooded sweatshirt, and a down vest during the November 25, 2006, incident. Undercover officers are not permitted to wear anything with a Department insignia on it. He did not want anybody inside the club to know that he was a member of the service. That is why Sanchez went into the club first to confirm that the two women who had been arrested earlier in the week were not there. Respondent Isnora wanted to blend in with the crowd, which was rowdier and more aggressive than it had been earlier in the week. This made him uncomfortable, nervous, and also heightened his senses. Both he and the Sanchez agreed that it would be a good idea to have Cooper join them inside the club. Based on his observations, Respondent Isnora believed that the man in the White Sox hat might have a gun. He agreed that this made him a little more nervous.

Even after Respondent Isnora retrieved his gun and shield from the car, he was still in the role of an undercover. While Person D was by himself outside of the club, the Person A Party contained seven or eight people. The men in the party were acting rowdy. Person B was big and loud. Person B and Person D engaged in a very heated argument, but they stayed a distance of eight to ten feet apart from each other. There was no punching, pushing, or kicking. Because Person D kept a hand in his jacket pocket area and did not back down from the argument, however, Respondent Isnora believed that Person D might be armed with a gun. Between Person D and the man in the White Sox hat possibly having

guns and Person B comment about getting a gun, Respondent Isnora's sense of alertness was raised.

Respondent Isnora did not call Napoli or any other member of the field team as he followed the Person A Party down 94 Avenue. He stayed approximately ten feet behind the party. At no point did he hear anybody in the party mention a gun or drive-by, nor did he see anybody display anything that looked like a gun. He never saw Person B or Person A before that day. Although he never turned around to see if Person D was still standing in front of the club, he absolutely believed that there was going to be a drive-by shooting. As Respondent Isnora has a long stride, he did not consider the walk from the club to Liverpool Street to be a long one. Approximately 30 feet from the corner, he attached his shield to his vest collar, which was black. The shield was on its backing, which was also dark colored. [RX C is a photograph of Respondent Isnora, showing his shield pinned to his collar.] At that point, he did not consider himself to be stepping out of role, as he held his hand over his shield. He explained that he covered his shield because he did not want the individuals that he pegged as lookouts to alert the rest of the party that the police were coming. He identified the lookouts based on his experience as an undercover in buy and bust operations.

When he turned the corner, he took his hand off of his shield. At that point, he took himself out of role as an undercover, wanting the party to know that he was a member of the service. He did not want the party to think he was associated with Person D and he intended on taking police action for the purpose of preventing physical danger to Person D and Sanchez. Other than the comments that Person B and Person A had made in front of the club ("Go get my gun," and, "Let's fuck him up."), Respondent Isnora had not

heard or seen anything to indicate there was going to be a drive-by. He did not see the trunk of Person A car open, nor did he see anyone reach on the floor of the car. He quickly approached Person A car. He did not feel a need to call the field team. He pointed his gun with arms extended. In addition to stating, "Police. Don't move," he may have also said, "Show me your hands." The car tried to flee. When the car struck Respondent Isnora, he was no longer issuing commands but was instead getting his balance. Meanwhile, the car ran into the prisoner van and gate. Respondent Isnora never actually saw anything that resembled a gun in Person B hand.

On re-direct examination, Respondent Isnora explained what he believed was going to happen when he saw Person B raise his arm:

With the event that just happened, "Go get my gun, go get my gun," and the driver disregarding my commands and then striking me, all those factors factored into my mind as his arm was reaching that it was a weapon. I wasn't going to wait to pull up and boom. I wasn't going to wait for that. But clearly . . . me firing my weapon, that was the last thing I wanted to do. I have to reiterate that.

He also explained that he did not call the field team as he walked up 94 Avenue because he had already provided the team with vital information as to the direction of flight and the description of the individuals. He believed, at the time, the ghost would relay the rest of the information and that the field team would get to the scene quickly enough to apprehend the individuals.

On re-cross examination, Respondent Isnora conceded that Person B did not actually have a gun. Upon further questioning, he explained that Person A car was parked parallel to the curb, and he stepped directly in front of it. The car moved forward, hitting him square on, causing him to fall onto the hood. The car continued to move forward but

now going toward the center of the street. Respondent Isnora was able to move to the sidewalk, where he heard the loud crashing noise of the car striking the prisoner van. The car then reversed toward its original parking place, but it proceeded to mount the sidewalk and run into a building. It then moved forward again in the direction of the prisoner van, which was in close proximity to the car's original parking spot. When Respondent Isnora started firing his gun, the rounds were passing through the passenger's side window.

Respondent Carey

Respondent Carey, a nine-year member of the Department, is currently assigned to Patrol Borough Manhattan South. He previously worked in his precinct's Street Narcotics Enforcement Unit, in which he participated in 250 to 300 plainclothes narcotics operations. Before transferring to CEU, he took a two-week long investigator training course and worked as an investigator in the Queens Vice Enforcement Division. During these operations, he communicated with the other members of his field team using both cell phone and Department radio. He started in CEU in October 2006.

On November 25, 2006, Respondent Carey and Oliver were assigned to the prisoner van, which was parked a block and a half to two blocks from the entrance to the Kalua Club. Normally, the team members in the prisoner van are just used for prisoner transport, but Respondent Carey and Oliver were also considered part of the apprehension team that day since the field team was smaller than usual. Oliver was driving the van, and Respondent Carey was the passenger. Throughout the operation, Respondent Carey received from Napoli periodic updates over the radio. He did not

speak directly with any of the undercovers. At one point, Napoli informed Respondent Carey that the undercover had communicated to him that a man inside the club might be armed. Napoli told Respondent Carey to stand by and wait for further instruction. A subsequent radio transmission stated that the undercover was standing in front of the club observing a dispute involving a man believed to have a firearm. At that point, Oliver put on his bulletproof vest. Respondent Carey had been wearing his vest since he left the command at beginning of tour. He was not wearing a raid jacket.

In a subsequent radio transmission, Napoli stated that the undercover was walking away from the club following a man that he believed had a gun. Respondent Carey asked Napoli twice which direction the undercover was walking, but he did not get a response. While parked on 143 Street, Respondent Carey saw Napoli's vehicle drive through the intersection at 94 Avenue in an eastbound direction. Having not received any response transmissions from Napoli, Respondent Carey and Oliver followed the lieutenant's car. Even though the original purpose of the operation was to make a prostitution or narcotics arrest, Respondent Carey believed at that point that a firearms arrest was what was going to take place.

Napoli's car turned onto Liverpool Street, and all of Respondent Carey's attention was focused on following it. When the prisoner van made the turn, Napoli's car was half a block ahead. When the brake lights on Napoli's car went on, Respondent Carey scanned the street and saw Respondent Isnora walking on the sidewalk in the direction of Person A car. Respondent Isnora's right arm was raised and outstretched parallel to the ground, and his gun was in his hand. Respondent Carey saw this from a distance of approximately three car lengths. The area was well-lit by a streetlight. As Respondent

Isnora walked toward Person A car, Respondent Carey heard him yell twice in an authoritative voice, "Police. Show your hands." Respondent Carey then saw Person A car strike Respondent Isnora before continuing forward as fast it could into the roadway, striking the prisoner van head-on. It was a distance of two or two-and-a-half car lengths from where Person A car had been parked to where it struck the prisoner van. When Person A car hit the van, neither Respondent Carey nor Oliver had his gun out.

After striking the prisoner van, Person A car went in reverse, jumped the curb, and crashed full speed into a building's metal roll-down gate. The force of the crash blew out the car's back windshield. In Respondent Carey's opinion, the people inside the Person A vehicle were showing no willingness to comply with police authority. This raised his level of awareness. The Person A vehicle then moved forward again, pulling off of the curb. Instead of escaping in a southbound direction, Person A cut the wheel in Respondent Isnora's direction and drove again as fast as possible into the prisoner van. Respondent Carey's assessment of the situation was that when given the choice of fight or flight, the Person A vehicle chose to fight:

In my opinion making a left turn would have been an easy escape for flight if he was looking to avoid the situation. He also could have gone wider right instead of cutting the steering wheel at such an angle and gone around us which also would have allowed him to flee the scene. So in my opinion the actions that he took on that second turn were directed and intentional at causing injury to either Detective Isnora who was standing nearby or myself or Detective Oliver.

When the Person A vehicle struck the prisoner van the first time, Respondent Carey started to step out of the van with the intention of apprehending the suspects. When the Person A vehicle struck the van a second time, Respondent Carey's right leg was outside of

the van but the rest of his body was still inside. As a result, he suffered a torn meniscus in his knee. As he got completely out of the van, he heard Respondent Isnora yell, "He's got a gun," and start firing his weapon. When asked why Respondent Isnora would yell, "He's got a gun," Respondent Carey explained that, as part of their training, they learned that when one team member sees a gun it is his responsibility to alert the other members that there is a weapon present. Respondent Carey explained his thoughts at that point, "I heard Detective Isnora yelling 'He's got a gun' several times, I had seen him fire several rounds from his weapon towards the passenger side of the vehicle, and hearing the gun shots, seeing the glass break from the passenger side window, I believed there to be gun fire coming from within the car and going into the car from outside."

Respondent Carey proceeded to fire his weapon three times. Had he wanted to, he could have discharged 16 rounds before reloading. While he fired, he was approximately 20 feet from Respondent Isnora. There was no doubt in his mind that Respondent Isnora was aiming at the Person A vehicle's front passenger (Person B) so that is where he aimed as well. Person B who was making small movements at first, at one point leaned toward the driver's side. Respondent Carey could not see Person B hands and did not see a weapon. He was never trained that he had to see a weapon before starting to fire his gun. He explained that a police officer is allowed to fire his gun when there is probable cause to believe that serious physical injury or death can be caused to himself or another person. He believed, at the time that he fired his weapon, that he had the probable cause to do so. At no point while he was firing did he see anybody other than Respondent Isnora and the occupants of the Person A vehicle in the immediate vicinity. Although he heard several voices yelling police commands before he started to fire,

nobody from the lieutenant's car crossed his line of vision while he was firing his weapon. Respondent Carey stopped firing after three rounds because he feared that there would be a dangerous crossfire situation with Respondent Isnora if he continued shooting. While the rest of the team was located to his south, Respondent Carey was shooting in a southeasterly direction. He explained what actions he took once he stopped shooting:

When I decided to stop firing my weapon, my first reaction was I believed that there was someone inside the car firing at Detective Isnora. Now having fired myself on that vehicle, I believed there was a possibility that whoever was firing from within the vehicle could redirect their fire towards me. I went for a second and squatted down behind the open door of my prisoner van that I exited. Within a second of squatting down there I remembered training that I went through at the range where they stress to you that a car door is not cover, that a round can pierce a car door and still cause severe injury. At that point, while still in the squatted position, still with my firearm lowered towards the ground, I ran around towards the back of the prisoner van towards the driver's side where I knew Detective Oliver and Isnora both were.

It took Respondent Carey a few seconds to run to the driver's side of the prisoner van. On his way there, multiple shots were still being fired. He believed, at the time, that the shots were being fired from both inside and outside of the Person A vehicle. Once he reached the driver's side of the van, the gunshots stopped. At that point, Respondent Carey raised his firearm toward the vehicle occupants and yelled for them to show him their hands. While Napoli went to the driver's side of the Person A vehicle, Respondent Carey approached the front passenger's side. He opened the car door with the intent to either remove a firearm or restrain the hands of the occupants so that they would be unable to fire anymore. Respondent Carey saw that there was no gun in the car.

He remained at the scene for an additional five to ten minutes before being removed to the hospital. During that period, he observed the team members who had been in Napoli's car (with the exception of Headley) walking near the Person A vehicle. Many other police units responded to the scene, and in total Respondent Carey observed ten to 12 uniformed officers walking around the area. He did not see anybody clear the crime scene or put up crime scene tape.

Prior to trial, Respondent Carey was given the offer of resolving this disciplinary matter with a Schedule "B" Command Discipline and the forfeiture of ten penalty days. He freely and voluntarily turned the offer down.

On cross-examination, Respondent Carey agreed that deadly physical force should be used only as a last resort and police officers are responsible for every round they discharge from their firearms. There are situations where an officer may be justified in firing his weapon but it would be unsafe to do so. While firing in those situations may not be criminal in nature, it may be outside of Department guidelines. It is an officer's duty to try, to the best of his ability, to minimize the degree of danger presented by a firearms discharge to innocent people and other officers present. This is done by assessing the potential danger to anyone who might be in the area.

Respondent Carey agreed that police officers are instructed to avoid firing into a windshield whenever possible. This is because bullets deflect easily from windshield glass and can change their flight path. Ricochet can also create a dangerous situation when firing in close proximity to other people. Officers are also taught to try to stay calm during these types of situations and to not make rash decisions that could lead to dangerous outcomes.

Officers have to be recertified with their firearms twice a year. At the certification test, officers shoot at targets. Although the test can be either indoors or outdoors, the lighting conditions are controlled and the targets are stationary. Respondent Carey agreed that firing at a moving target is substantially more difficult than firing at a stationary one. Officers are taught to identify their target and aim for center mass when firing in a real-life situation. This is done because they are not expected to be perfect marksmen and might miss the target for which they are aiming. All of these are factors to be considered when an officer decides whether or not to fire his weapon.

Respondent Carey reiterated that Napoli informed him, at one point, that an undercover observed someone he believed to have a gun. He later received from Napoli a description of the suspect, who was the man in the White Sox hat. This was the only description of a suspect that he received that day. This all took place while Respondent Carey and Oliver were in the prisoner van. They were dressed in plainclothes, and there was nothing on the outside of the van to indicate it was a Department vehicle. They were trying to blend into the neighborhood as best they could.

When Respondent Carey saw Napoli's car drive by and decided to follow it, it was his belief that they were still looking for the man in the White Sox hat. Napoli's car was approximately three-quarters of a block ahead of the prisoner van as they drove eastbound on 94 Avenue. Respondent Carey agreed that it was a long block. The prisoner van did not have a light package, and Respondent Carey did not recall seeing lights flashing on Napoli's car. As they drove past the club, Respondent Carey did not notice anything in front. He reiterated that he unsuccessfully attempted to raise Napoli

on the radio. Although he had Napoli's number in his cell phone, at no point did he try to call him.

The prisoner van was facing south when it turned onto Liverpool Street. Respondent Carey reiterated that he saw Respondent Isnora walking on the sidewalk, but he clarified that Respondent Isnora was actually in the process of walking in a south-westward direction from the sidewalk to the front of the ^{Person A} ^{Person A} vehicle. Respondent Isnora's back or shoulder was turned to Respondent Carey. From that view, Respondent Carey could not see Respondent Isnora's shield. Respondent Carey could not recall if the windows of the prisoner van were up or down. While he knew that the front passenger's window of the ^{Person A} ^{Person A} vehicle was raised since the glass from that window shattered when the gunfire commenced, he did not know about the rest of the windows in that car. At no point while driving down 94 Avenue and turning into Liverpool Street did Respondent Carey see ^{Person D} SUV.

Although Respondent Carey believed that they were looking for the man in the White Sox hat as he followed Napoli's car, he had yet to see anybody wearing a White Sox hat when he observed Respondent Isnora walking toward the ^{Person A} ^{Person A} vehicle.

Respondent Carey explained the correlation between Respondent's Isnora's approach of the vehicle and the radio transmissions he had received from Napoli earlier in the tour:

The undercover was observing the man with the gun, we were told to move in closer to the set and stand by for further information. The further information that we received over the radio transmission from the lieutenant was that the undercover was walking away from the club following the man from the dispute. There were no further transmission as far as description, but as far as I was concerned the undercover was following the man with the gun and that was the correlation that I believed, that now the undercover had followed the man to the car where I

now saw figures inside of the car. So when I did not see a man with a White Sox hat standing on the street at that time, I saw Detective Isnora had followed from point A to point B and was now attempting to do a felony car stop.

There was never a plan in place for Respondent Isnora to apprehend the man with the gun, and Respondent Carey knew that something out of the ordinary was taking place when he saw Respondent Isnora stepping off the curb with his firearm raised. He agreed that stepping in front of a vehicle that has its motor running is not how police officers are trained to conduct car stops. If possible, it is more tactically sound to approach from the rear of a vehicle. He also agreed that it is particularly important to use proper tactics when there is a belief that there may be a firearm inside the car.

When Respondent Isnora stepped in front of the Person A vehicle, Person A drove straight out of the parking spot directly into him before striking the prisoner van. Respondent Carey did not believe, at the time, that these actions were accidental. What he believed was that the vehicle occupants "had intent to injure someone or all of us based in the fact that they directly hit Detective Isnora and they had a direct head-on collision with us." At that point, Respondent Isnora, who was dressed in plainclothes and had spent over two hours in the club blending in with the crowd, had just stepped in front of the bumper and pointed a firearm into the car. Respondent Carey began to hear gunshots as the Person A vehicle was driving toward the prisoner van for the second time. Respondent Isnora was moving toward the vehicle as he started to discharge his weapon.

As Respondent Carey stepped out of the prisoner van, he did not see any of Respondent Isnora's bullets strike a target. He, therefore, did not know whether or not the intended target had been struck. Respondent Isnora never stated that it was the front passenger or rear passenger who was supposedly armed. When Respondent Carey began

to shoot, he fired three times in rapid succession. His decision to aim at Person B was based on his “personal observations as well as [his] observations of what [he] believed Isnora was shooting at.” He did not fire upon the car because the car was using force against him. He explained his decision, “When I saw Detective Isnora, when I saw him fire and heard him yelling ‘gun,’ those were the final factors that made me decide to fire my weapon.” He reiterated that he did not see Person B hands. While he may have seen one of Person A hands on the steering wheel, he did not see both of Person A hands at the same time. He conceded that he did not see Person A holding anything that resembled a firearm, nor did he ever see a muzzle flash coming from inside the Person A vehicle.

Respondent Carey reiterated that, as he stepped out of the prisoner van, he heard the voices of other field team members. According to Respondent Carey, Napoli’s car was not blocking any exit path that the Person A vehicle could have taken, and at no point after the shooting began did he see the lieutenant’s car reverse. He was aware of Respondent Isnora’s location when he started firing. He stopped firing because Respondent Isnora was walking in the direction of what eventually could have been his line of fire. He reiterated that he did not want to start a crossfire situation. He did not see Oliver at any point during the actual gunfire. Respondent Carey described the sequence of shots:

The first rounds that were fired came from Detective Isnora. After that, there were rounds being fired from different directions. Those later rounds were in quick succession with no silence at all in between them. The first three or four rounds may be fired by Detective Isnora, while coming from only one gun had a split second of silence in between them.

[DX 6L is a photograph of Liverpool Avenue, looking southbound off the corner of 94 Avenue. In the picture are the prisoner van and ballistic markers on the street next to it. DX 6H is a photograph of 94 Avenue, looking northbound toward the Air Train station. It shows a portion of the west side of the street roped off with crime scene tape. DX 6W is a photograph of the inside of the Person A vehicle. It shows a bloody seat with a set of keys and a cell phone on it.]

FINDINGS AND ANALYSIS

On November 25, 2006, both Respondents, along with other officers, were part of a team in the Club Enforcement Unit assigned to deal with the problem of clubs in which crime such as prostitution and drug use occurred. Respondent Isnora was an undercover, while Respondent Carey was one of the backup officers specifically assigned to the prisoner van.

Respondent Isnora entered the Kalua Club at approximately midnight and remained there for almost four hours. His task was to try to make a buy that would lead to either a prostitution or drug-related arrest. A week earlier, Respondent Isnora's undercover work had led to the arrest of two women on drug charges at the club and another arrest would enable the city to close the club.

Sanchez and Cooper were also undercover. Sanchez was Respondent Isnora's ghost, tasked with watching to ensure his safety. Cooper came into the club during the night, at Sanchez's request, to provide additional protection.

During the course of his surveillance inside the club, Respondent Isnora saw an interaction which led him to believe that a man, whom he identified as wearing a White

Sox hat, was armed. Information about that man was, at some point, conveyed to the team leader and other team members, including Respondent Carey in the prisoner van.

Sometime later, without having made any drug buys or interactions regarding prostitution, Respondent Isnora decided to leave the club as it was near closing time. Once outside of the club, Respondent Isnora retrieved his firearm and shield from one of the team's vehicles. He went back to a position near the front of the club where he and Sanchez observed a verbal dispute involving a man, later identified as Person D and a group of men including, persons later identified as Person A and Person B. During this dispute, Respondent Isnora said he heard Person B say words to the effect of, "Go get my gun." He also said he heard Person A say, "Let's fuck him up."

What can best be described as the Person A Party, consisting of about seven or eight people according to Respondent Isnora,⁵ walked off in an easterly direction, down 94 Avenue.

At some point while they were still in front of the club, Sanchez had called the team leader, Napoli. Respondent Isnora took Sanchez's cell phone and spoke to Napoli. Respondent Isnora described the direction in which the Person A group was headed and was told to follow the group, after which he returned the phone to Sanchez.

Sanchez remained on the street in the vicinity of the club watching Person D who he believed had a gun and keeping a watch out for the man in the White Sox hat, who he believed was about to exit the club and who Respondent Isnora had informed him might have a gun.⁶

⁵ Sanchez said the party was made up of about 15 people.

⁶ The man in the White Sox hat was apparently not seen again and had no involvement in any of the events outside the club.

Respondent Isnora followed the Person A group on foot. Near the corner of 94 Avenue and Liverpool Street, the group apparently broke up. Person A Person B and a person later learned to be Person C headed south on Liverpool Street to a car parked on the east side of that street facing 94 Avenue. It is not clear where the other people in the group went but Respondent Isnora indicated that when he turned the corner he saw two or three people in the area who he believed were lookouts. Respondent Isnora testified that, while he was approaching the corner of 94 Avenue and Liverpool Street, he put his shield on his collar but covered it to prevent those people near the corner from seeing it.

As he proceeded down Liverpool Street, Respondent Isnora took his gun out of his pocket. He also, at about that time, saw Napoli's car pass him. He then observed the Person A car headlights go on and fearing a drive-by shooting was about to occur, he went directly to the front of the Person A car. At this point, he was holding his firearm with his arms outstretched in front of him and pointing it at the Person A car. He announced, "Police" and ordered the men not to move.⁷ The car moved forward and knocked him over onto the hood. He came off the car near the curb and was apparently not seriously injured. The car then pulled into the street and moved rapidly down the block striking the prisoner van. The car rapidly backed up and, turning almost perpendicular to the street, struck the wall of a building on the east side of the street shattering the vehicle's rear window. The car then went forward and struck the prisoner van a second time. According to Respondent Isnora, at some point after the car struck the wall and before it hit the prisoner van a second time, he saw Person B make a motion with his arm that led him to believe Person B was reaching for a gun. Respondent Isnora stated that he did not see

⁷ In some recounting of the incident Respondent Isnora said he also told them to show him their hands which, as the Department Advocate noted, would have been inconsistent with the directive not to move.

anything in Person B hand, indeed he did not see Person B hand, but based on the arm movement, Respondent Isnora yelled, "Gun" at least once and opened fire on the car, through the passenger window with Person B as his target. Respondent Isnora testified that he fired and afterwards realized that he had used all of the rounds available in his firearm.

Respondent Carey described coming on the scene as a passenger in the prisoner van driven by Oliver. He saw Respondent Isnora walking towards the Person A car with his right arm stretched out and raised parallel to the ground. He heard him yell, "Police. Show your hands." He saw the car strike Respondent Isnora before continuing fast into the roadway and striking the prisoner van head-on. He saw the Person A car back up and hit the wall blowing out the vehicle's rear window. It came forward and hit the van again. He heard Respondent Isnora yell, "Gun" and saw him start to fire. Respondent Carey fired three rounds and stopped firing when Respondent Isnora came into his line of fire.

This is a general outline of the facts in this case. The facts presented to this Court come from three eyewitnesses: Sanchez, Respondent Isnora and Respondent Carey.⁸ In order to obtain the most comprehensive understanding of the facts possible, the Court has reviewed all of the available testimony in evidence from these witnesses. In the case of Respondent Carey, this includes his official Department interview conducted on May 11, 2007, along with his trial testimony. In the case of Respondent Isnora, this includes his

⁸ The Court inquired about surviving civilian witnesses to the events such as Person B and Person C. The Court was advised by the Department Advocate that at the conclusion of the criminal trial, the judge stated that they were not credible. Consequently, the Department did not rely on their testimony nor did this Court in its finding (except to the extent that such may have been included in the stipulation). The testimony of Person B and Person C were received in evidence to make a complete record and for informational purposes.

official Department interview conducted on April 7, 2010, his testimony before the Grand Jury, and his trial testimony.

While there are some issues of fact which lack clarity or which are the subject of some disagreement, for the most part, the facts as presented to the Court are not in dispute. The key issues that are in contention involve matters of judgment, that is, whether the judgments made by Respondents constitute misconduct.

Disciplinary Case No. 82789/07 regarding Respondent Isnora has seven specifications. The first five specifications allege criminal conduct and were dismissed by the Department Advocate. Specification Nos. 6 and 7 charge administrative misconduct. Specification No. 6, in essence, charges Respondent Isnora with improperly stepping out of his role as an undercover officer and taking enforcement action. Specification No. 7 charges him with discharging his firearm outside of guidelines.

Disciplinary Case No. 84030/08 regarding Respondent Carey has one specification which charges him with discharging his firearm outside of guidelines.

There are two aspects of Respondent Isnora's decision making that need to be examined. The first deals with Respondent Isnora's belief that the Person A group was about to commit a drive-by shooting. The second deals with the tactics he employed.

Respondent Isnora contends that he had a reasonable basis to believe that the Person A group was about to engage in a drive-by shooting. This belief, he claims, was based on the fact that during the verbal argument outside the Kalua Club, he heard Person B say, "Go get my gun, go get my gun." He also heard Person A say, "Let's fuck him up." He was further confirmed in his suspicion when he turned the corner of Liverpool Street and saw several people standing there. He concluded that these people were lookouts related to

the impending drive-by shooting. Further, he contended that what he believed to be hurrying by Person A Person B and Person C confirmed his belief that a drive-by shooting was about to occur.

There is no question that the words, "Go get my gun" and the statement, "Let's fuck him up" should have alerted Respondent Isnora to the possibility that some form of illegal and violent behavior was about to occur, but it was just that, a possibility, not a certainty as Respondent Isnora believed.

Thereafter, Respondent Isnora appears to have perceived any action that might have been consistent with this conclusion as confirmation of it, while ignoring any possibility that he may have miscomprehended the situation.

For instance, his determination that the two people on the corner were lookouts does not really make a lot of sense. For one thing, he stated that he first saw them after he turned the corner. The intersection of Liverpool Street and 94 Avenue is "T" shaped. Liverpool Street begins at 94 Avenue and heads off to the south. The north side of 94 Street has a continuous sidewalk and parking lot abutting the Air Train elevated station. 94 Avenue, which has two-way traffic, is something of a main avenue, while Liverpool Street, which is also a two-way street, is something of a side street.

The position Respondent Isnora described for the so-called lookouts would have given them a view of Liverpool Street but, at best, they would have had only a partial view of 94 Avenue. Obviously, an effective lookout had to be able to see in both directions down 94 Avenue. Had Respondent Isnora considered the matter, he might have realized that this is not where lookouts would likely place themselves.

During his official Department interview, he gave an extensive statement about the two lookouts being a man and a woman. He agreed that the Person A group seems to have been all-male and that he did not know where the female had come from. Later in that interview, he changed his testimony after being confronted with his Grand Jury testimony where he had said there were three men. He adopted that version of events. At this trial, he said there were two individuals. Whichever of these versions is accurate, he did not describe the lookouts as being people he recognized as being part of the Person A group and thus, there was no clear reason to believe that they had been tasked as lookouts.

Additionally on this issue, Respondent Isnora said that he concluded these individuals were lookouts because he was familiar with lookouts from buy and bust operations. But those operations are aimed at drug sellers who work from a fixed location where they interact with customers, hence, the need for lookouts. In this instance, he was not investigating a drug-selling spot but what he believed was a spur of the moment decision to conduct a drive-by shooting.

This is not to say that Respondent Isnora should not have considered the possibility that these individuals were lookouts, but he also should have considered other possibilities such as that these were other people who had exited the club near closing time and were simply hanging out.

His conclusion that because the Person A group was walking fast meant that these men were intent on committing a crime is equally without basis. First of all, there is a question about what this hurrying actually was. During his official Department interview, he repeatedly referred to these men as walking. At trial, he discussed them hurrying, but again used the word walking. They were clearly not running. Sanchez, the

only other witness on this subject, said that there was nothing unusual about their pace.

Respondent Isnora testified, "It wasn't just walking like they were going home. They were going back for Person D. No doubt in my mind." This is an interesting but unsupported conclusion. If, in fact, the Person A group was hurrying, that was something he could consider in assessing the situation but it was not proof of violent and criminal intent as Respondent Isnora concluded.

Respondent Isnora ignored other factors that might have tempered his conclusion that violence was an imminent certainty. One of these factors is that he agrees that he heard no further discussion of the argument with Person D. It seems extremely unlikely that a group of men angered by a verbal confrontation and intent on some kind of escalation would not reinforce their determination with further angry words asserting the correctness of their opinion, debasing the other party and re-stating their desire to wreak vengeance. This Court observed the distance that had to be traveled by these men before reaching Liverpool Street and it comprised most of a long city block. The walk down this block, even at a good speed, would have afforded ample opportunity for such conversations, yet Respondent Isnora did not hear anything at all and did not consider that absence of any significance in perhaps indicating that tempers had cooled.

Another factor Respondent Isnora failed to consider were the potential actions of Person D during this period of time. Person D was the target of the drive-by Respondent Isnora was certain was going to be carried out by Person B and Person A. If Person D left the area, the purpose of the drive-by would have been removed.

We know that Person D in fact, left the location shortly after the Person A group walked off. Sanchez testified that he saw it and the parties stipulated to it. Respondent Isnora

conceded that he did not look back down 94 Avenue to see if Person D was still there to confront the occupants of the Person A vehicle. But even more significant is that Sanchez observed and the parties stipulated that Person D drove east on 94 Avenue and turned right onto Liverpool Street. That is exactly the direction that Respondent Isnora went as he followed the Person A group to their car. Thus, he did not look for the target of the potential shooting nor did he notice that that person had passed him and it would have appeared at that time to have left the scene.

With regard to this issue, some of the things Respondent Isnora said do not make sense. He testified at this trial that the reason he did not look back to see if Person D was still in front of the club was because Person D was not the aggressor. But, if the purpose of his coming out of his role as an undercover was to prevent a drive-by shooting, the removal of the target would have been of critical importance.

At other points in his testimony, Respondent Isnora indicated that he and Sanchez, along with Person D might have been the targets.⁹ There is no reason why he should have believed this as neither of them was with Person D. However, if he had that concern, there is no evidence that he ever communicated it to Sanchez.¹⁰ If he believed that the Person A Party thought that he was with Person D then he knew that his exit from his undercover role to an enforcement role would be that much more challenging.

⁹ One example of this is found in Respondent Isnora's official Department interview. When asked why he stopped the Person A car without waiting for backup, Respondent Isnora stated that he "wasn't going to wait any longer for them to get to the car, go get the gun, and shoot me and Sanchez or Person D" (DX 3, p. 118).

¹⁰ Describing his departure from Sanchez during his official Department interview, Respondent Isnora was asked if he relayed any information to Sanchez. Respondent Isnora stated, "Mm, no. I don't think there's a need to. The—detective was my ghost for the night, so if he seen me walk off, and uh, I mean, I can't say. I don't know what was on his mind" (DX 3, p. 130-131).

On the subject of Person D the most troubling statements made by Respondent Isnora occurred during his official Department interview. He was confronted with the fact that Person B Person C and Person D all testified at the criminal trial that Person D SUV passed the group near the vicinity of the corner of 94 Avenue and Liverpool Street. Respondent Isnora characterized that testimony as not true "whatsoever."

When asked if he might have looked away and missed seeing Person D SUV, Respondent Isnora said that that was not possible. He went on to say, "My eyes were on them [the Person A group]. And like I said, it was four in the morning. The only car that passed by me was a member of the field team" (DX 3, p. 179). Respondent Isnora's statement about not seeing Person D SUV and indeed all of his comments about Person D raise serious concern about the quality of his analysis of the situation, of his police work during this event and the reliability and accuracy of his observations that night.¹¹

Another factor apparently considered by Respondent Isnora in support of his belief that a drive-by shooting was about to occur was his belief that when a threat is made "on the street" that threat is an absolute commitment to violence.¹²

But the human experience is actually otherwise. People say things that they do not mean all the time and the English language contains numerous words and phrases to demonstrate that this is a part of the human experience. Bragging, braggadocio, bombast and bull are just some words to express this. Certainly, the phrase "empty threat" attests to the fact that humans often make threats they have no intention of keeping. Threats

¹¹ Yet another questionable statement made by Respondent Isnora about Person D is found in his official Department interview when he said, "To my knowledge he is still there [in front of the club] because he just got threatened with a gun. So I thought he was just going to stand there and see what they were going to do." (DX 3, p 176).

¹² This is most clearly stated in his official Department interview where he said, "On the street no one ever says that unless they are going to go through with it." (DX 3, p. 159).

certainly can be acted on and that is why they raise the possibility that violence might occur. Respondent Isnora's belief that words guarantee deeds contributed to his certainty and it is simply an unreasonable assumption.

Indeed, the whole drive-by scenario postulated by Respondent Isnora contained inferences built upon inferences.

Overriding all of this was Respondent Isnora's certainty that a drive-by shooting was about to occur. He did not just think it might occur, he was absolutely certain it would occur. Respondent Isnora described his mental state on this unambiguously when he testified at this trial. At one point he stated that there was "[n]o doubt in [his] mind" that they were going back for Person D and, at another point, he testified that he was "absolutely" certain that there was going to be a drive-by shooting.

By seeing every action as reinforcing his belief and ignoring anything that might have given him pause, Respondent Isnora came to a certainty where only a suspicion actually existed. This certainty led Respondent Isnora to engage in some highly questionable tactical actions.

The first of these was proceeding down 94 Avenue and onto Liverpool Street without backup. In his closing argument, counsel for Respondent Isnora attacked Sanchez for failing to provide backup. Sanchez, who was unarmed, has not been charged with misconduct. His testimony about his conduct makes sense and seemed appropriate to the situation.¹³ But even if there had been a failing on Sanchez's part, it was

¹³ Counsel for Respondent criticized Sanchez for not being present when Respondent Isnora left the club, however, at that point, Respondent Isnora was in the presence of another undercover, Cooper, who walked with him when he retrieved his firearm and shield. Respondent Isnora re-joined Sanchez outside the club. Sanchez remained outside the club. There is evidence that he was capable of seeing down 94 Avenue to Liverpool Street because he observed Person D vehicle make a turn there.

Respondent Isnora who turned the corner onto Liverpool Street, out of all possible sight of Sanchez.

The other problem with Respondent Isnora's action at this point is that he had no contact with the lieutenant or anyone on the backup team. After the confrontation in the street near the Kalua Club, he took Sanchez's cell phone and spoke to the lieutenant but he did not maintain that contact. He returned the phone to Sanchez and testified at this trial that he did not recall if he had his own cell phone on him at the time. There was apparently no way for anyone on the team to know that he had turned the corner and was alone on Liverpool Street.

It was roughly at this point, in the vicinity of the corner of 94 Avenue and Liverpool Street, that Respondent Isnora placed his shield on his collar but then covered it with his hand to prevent anyone from seeing it.

During his official Department interview, Respondent Isnora indicated that there was no apprehension plan. He stated that his task had been to wait with Sanchez, go back to the vehicle and identify the man in the White Sox hat. In other words, his transition to an enforcement role was outside of any plan that existed and he was the only one who knew what he was doing or why he was doing it.

Additionally Respondent Isnora determined that his personal solo action was the last possible way to stop the drive-by shooting. But the Person A vehicle would have had to travel a distance north on Liverpool Street and a substantially longer distance west on 94 Avenue before it could reach what Respondent Isnora believed was its intended target. It is true that, at about that point, Napoli's vehicle passed him but there were four other

officers in two other vehicles that were part of the team; the prisoner van and the Gallant that might have been able to be engaged if contacted.¹⁴

The next series of tactical decisions were central to the ultimate shooting incident. Respondent Isnora put himself directly in front of the Person A vehicle and pointed his gun with outstretched arms directly at the windshield.¹⁵ Respondent Isnora did this, he said, because he believed that this was the only way he could have prevented the drive-by shooting as the headlights had gone on and the car was about to move.

As Respondent Isnora and even his expert witness agreed, this was a very dangerous tactic. Their position was that it was used under extreme circumstances. As has been discussed previously, this Court does not see that such extreme circumstances existed but, even if they did, this tactic was deeply flawed for several reasons.

The first of these is that there was no backup plan. Standing directly in the center of the front of the car by his testimony at this trial about a foot away; by his statements at the official Department interview, about five inches away—he left the occupants of the car two choices: submit or attempt to flee. Indeed, by putting himself that close to the front of the car, he made himself an inviting target with no room for escape.

He might have believed that the occupants of the car would have submitted to police authority. But that would have been a dubious premise given that he believed they were bent on committing a very serious violent crime and thus they were not law-abiding citizens. So there was a reasonable chance that his conduct would have escalated the

¹⁴ The Gallant with Edness and Graham was the vehicle from which he had retrieved his firearm and shield.

¹⁵ During his official Department interview, Respondent Isnora stated that as he walked to the car he had his gun “down by my side” and “as soon as I got in front of the vehicle, I then pulled it up.”

situation even if he were correct in his belief that the Person A car contained incipient felons and that they recognized that he was a police officer.

Which brings us to another critical issue: whether Respondent Isnora had any reasonable expectation that the occupants of the car would know that he was a police officer. Here, one has to consider what would have been experienced by the people in the car.

Respondent Isnora, by his own testimony, would have seemed to have come almost out of nowhere and appear directly in front of the car as it was about to pull out. His two arms were stretched out in front with a gun pointed at the occupants.¹⁶ Respondent Isnora testified that he shouted that he was a police officer but there is no testimony that any of the car windows were open¹⁷ and no entirely good reason to believe that they heard or were able to process the information, given the gun pointed directly at them.

Respondent Isnora had also clipped his detective shield on his collar.¹⁸ Respondent Isnora expressed certainty that the occupants of the car saw his shield, which he insisted was clearly visible. This, like other matters that he was certain about, was a possibility but hardly something a reasonable person would have seen as a certainty. A detective shield is a piece of metal about two inches by two and a half inches. His stance, with raised shoulders and extended arms, would likely have obscured part if not that

¹⁶ This is most clearly set forth in Respondent Isnora's official Department interview. He described his arms as "completely locked out" and that the firearm had "two hand support" (DX 3, p. 170, more completely set forth on DX 3A, the audiotape). He further stated, "I got in front of the car. Both arms up. Police don't move," (DX 3, p. 171) and that he had two hands on the weapon (DX 3, p. 204).

¹⁷ During his official Department interview, he stated that the windows were closed (DX 3, p. 154). He also acknowledged that his first shot shattered the passenger window.

¹⁸ RX C is a photograph of Respondent Isnora with the detective shield on his collar. He said this photograph depicts how he looked on the night of this incident.

entire shield pinned to his collar as he described, from the view of those in the car. Even if it was somewhat visible, the main focus of attention would likely have been the gun pointed directly at them.

Of course, it could be argued that this is merely speculation about what those in the car perceived. But that speculation is specifically required of undercovers who are warned in their training that members of the public would not recognize them as police officers and this is something that they need to consider before stepping out of their undercover role, into an enforcement role. Even Respondent Isnora said he was concerned that they might think he was somehow connected with Person D. Had he thought about it more critically, he would have realized that there was a very good chance, if not a likelihood, that the occupants of the car would not know he was a police officer and that they would perceive that they were being confronted by a dangerous criminal primed and ready to use deadly physical force.

Clearly, the tactics employed by Respondent Isnora were bad and not properly considered. Just as important was the fact that, had he more patiently evaluated the entire scene, he might have noticed that a backup team was actually right there. Respondent Carey testified that when he and Oliver arrived on the scene, he observed Respondent Isnora walking on the sidewalk in the direction of the Person A car with his arm raised and outstretched with the gun in his hand. Clearly, the prisoner van was on Liverpool Street before Respondent Isnora jumped in front of the Person A car. As with his failure to notice Person D drive past him, Respondent Isnora failed to observe the entire scene, including the prisoner van headed his way before taking dramatic and dangerous action.

Hindsight

One of the great concerns in this case is the issue of viewing the events in question through the lens of hindsight. We know that the three men in the car Person A Person A Person B and Person C were unarmed. We know that as a result of a hail of police gunfire, Person A was killed while Person B and Person C were injured. Determining whether the conduct of these Respondents was improper, however, cannot be done looking backwards from the result. It must be done looking forward as the events unfolded and that is the goal of this analysis.

A related issue is that of "second guessing." Almost any human action can be done a different way. When things go badly, there is an inherent tendency to look back and find fault with decisions because things did not work out as one might have hoped.

This Court is amply aware of these issues and has considered them carefully in coming to any conclusion about the conduct of each Respondent in this case. With regard to Respondent Isnora, it would appear to this Court that a reasonable police officer looking at the events as they unfolded could have seen that there was reason for doubt that a drive-by shooting was about to occur. It appears to this Court that a reasonable and competent undercover going off to follow possible violent suspects would have made sure to have a means of contact with the team leader and would certainly have called him both to provide notice and to gain approval before heading down Liverpool Street. It appears to this Court that a reasonable police officer could have seen, looking at events as they unfolded, that by rushing directly to the front of a car about to move and pointing a firearm at the occupants, he ran a significant risk of instigating violence rather than preventing it. Additionally, and of critical professional importance, a reasonable police

officer working as an undercover would know there was a serious danger that the men in the car would not recognize that he was police officer and might well believe that they were being confronted by a dangerous criminal who was about to use deadly physical force against them. Moreover, it seems that a reasonable police officer in an undercover capacity could have also seen, taking events as they unfolded, that backup was nearby and that reasonable police action involved utilizing that backup.

There is one other argument made by Respondent Isnora that must be considered before coming to a final conclusion regarding Specification No. 6. Respondent Isnora offered the testimony of an undercover officer with 19 years of experience who appears to have endorsed Respondent Isnora's actions as appropriate. UC 178 was not present at the scene. He was asked several hypothetical questions. No hypothetical question can fully encompass the scope of events on the street at the time of an incident. The hypothetical questions posed to the UC 178 contained the same flaws as Respondent Isnora's thinking. The first of these questions failed to consider any conduct that might have occurred consistent with innocent behavior on the part of the Person A group and, indeed, accepted as fact Respondent Isnora's conclusion that Person A and Person B were about to retrieve a weapon and immediately return to the front of the club to shoot Person D.

In assessing the issue of backup, UC 178 discussed the fact that Napoli's vehicle passed Respondent Isnora and concluded that there was no possible backup available and that Respondent Isnora's actions in going to the front of the Person A vehicle represented the last possible opportunity to prevent the drive-by shooting.

No consideration at all was given to the fact that the prisoner van with Oliver and Respondent Cary was on the scene and was in a position between the Person A car and 94 Avenue. Further, as can be seen in the crime scene diagrams (DX 5A and 9A), the prisoner van was at an angle and partially blocking both traffic lanes of Liverpool Street which may explain why the Person A vehicle smashed into it as Person A pulled away from the curb in his attempt to drive away.

UC 178 noted, on cross-examination, the importance of communication for an undercover officer yet, in validating Respondent Isnora's actions, he ignored Respondent Isnora's troubling failure to maintain communication with the team leader. He failed to take into consideration how proper communication might have prevented Napoli from passing Respondent Isnora and might have alerted Respondent Isnora to the presence of the prisoner van. UC 178 also failed to consider how Respondent Isnora's "go it alone" approach could have been avoided with appropriate communication and more effective observation of the scene.

Far more persuasive testimony about tactics and procedures was offered by Ward, who noted that Respondent Isnora's responsibility as an undercover was to make contact with the field team and keep the purported subjects under observation.

Respondent Isnora's analysis of the situation was seriously flawed. It was in direct conflict with the training given to undercovers, warning of the problems that can be created by overreacting to danger signs and stepping out of his role as an undercover. His tactics were poor and he failed to assess the overall situation which would have allowed him to let the backup officers take enforcement action. He unnecessarily attempted to single-handedly stop the Person A vehicle in a manner that jeopardized the safety

of himself and others. All of these are encompassed within Specification No. 6 and Respondent Isnora is found Guilty of that specification.

The decision to shoot

Before discussing the firing, it should be noted that there is some discrepancy between the two versions presented as to when the firing began. There seems to be no question that, after Respondent Isnora placed himself in front of the Person A vehicle, it went forward and to the left, striking Respondent Isnora, who went onto the hood before coming off the car and recovered his footing near the curb on the passenger side of the vehicle. The car continued toward the street and stuck the prisoner van which, from the diagram, was blocking its path. It backed up while turning, jumped the sidewalk and continued until the rear of the car struck the building. It then came forward again, passing Respondent Isnora and struck the prisoner van a second time.

Respondent Isnora testified that he began firing after the Person A vehicle had hit the wall but before it hit the prisoner van the second time. Respondent Carey testified that the firing began after the Person A vehicle struck the prisoner van the second time.

There is probably no way of knowing exactly what happened, but from the evidence presented, it seems reasonable to believe that Respondent Isnora, as he said, began firing before the second time the vehicle hit the prisoner van. This is because he stated that Person B was right in front of him and he described firing directly through the passenger window, shattering it. Additionally, Respondent Carey described Respondent Isnora as moving into his potential line of fire. This might well have occurred when Respondent Isnora moved toward the Person A car after it had struck the prisoner van.

Counsel for Respondent Isnora has repeatedly stressed that the decision to shoot was a split-second event. It was, he contended, a life-or-death decision that had to be made instantaneously. Time may be a factor but every decision is made in the context of prior and surrounding events.

The first problem with Respondent Isnora's decision to fire his weapon goes back to the tactics he employed. He had placed himself in a situation where he had no cover. Even when the car, occupied with men who he believed were armed and dangerous, started to move erratically, he was still out in the open. He certainly, according to his account, did not, at any time during the incident, seek cover.¹⁹ Thus, when he saw Person B arm move, he was exposed and he left himself with a decision that he believed had to be made quickly, a decision he said had to be made before he could see Person B hand and what, if anything, was in it.

Then there is the history of Respondent Isnora's encounter with the Person A Party. One cannot separate the incredible level of conjecture that led Respondent Isnora to believe that Person B and Person A were, beyond doubt, going to engage in a drive-by shooting and to believe, again with complete certainty, that the occupants of the Person A car knew he was police officer. This unsupported certainty is the context in which he came to the conclusion that Person B arm movement was an effort to reach for a firearm rather than, as may have been the case, a cell phone.²⁰ These same failings caused him to yell "Gun." It also formed the basis for his decision to discharge his weapon, indeed, to discharge every available round in his weapon before he realized he had done so. When all of these

¹⁹ In his official Department interview he stated that during this period of time he kept his firearm out and pointed at the Person A vehicle (DX 3, p. 192).

²⁰ There is no indication of what, if anything, Person B was reaching for. There is, however, a crime scene photograph of the car seat he had been in. It is bloody and there are broken bits of glass about. There is also an open flip-type cellular phone on the seat (DX 6W).

factors are taken into consideration, it is clear that Respondent Isnora's decision to use deadly physical force was based on flawed reasoning, poor tactics and a lack of control. The combination and interaction of these factors caused him to discharge his weapon without probable cause to believe that deadly physical force was necessary to protect himself or others. Respondent Isnora is found Guilty of Specification No. 7.

Respondent Carey is also charged with improperly discharging his firearm. Here, however, the context is completely different. Respondent Carey arrived on the scene and the first thing he observed was Respondent Isnora heading towards the Person A vehicle with his hands outstretched in front of him pointing a firearm at the occupants of that car. That stance carried a powerful message. While it caused panic in the Person A car, it sent a different, but equally compelling, message to Respondent Carey. That picture was of an officer taking extreme measures to confront a person or persons who were immediately capable of using deadly force.

He did not know, and could not know, of the flaws in Respondent Isnora's thinking and tactics. He had every reason to believe that, when the Person A car started moving erratically and slamming into the prisoner van, it was attempting to flee from lawful police authority. Further, he had every reason to rely on Respondent Isnora's determination that the use of deadly physical force, that is, discharging a firearm at Person B was necessary and appropriate. He had every reason to believe that Respondent Isnora, who was apparently much closer to the passenger side of the Person A car than he was,

had actually seen a gun or had extraordinarily good reason to believe Person B had a gun, when Respondent Isnora yelled, "Gun."²¹

Respondent Carey fired three rounds and stopped firing although he had many rounds left in his firearm. During closing arguments, the Assistant Department Advocate claimed that Respondent Carey engaged in "contagious firing." The facts are that a total of 50 rounds were fired by officers during this incident, of which Respondent Carey discharged three. Respondent Carey was in close proximity to Oliver. Oliver emptied his entire magazine, reloaded and emptied a second magazine, discharging a total of 31 rounds. Respondent Isnora was apparently not far away and he discharged 11 rounds during this period. Respondent Carey was certainly in a position to be drawn in to this wild and uncontrolled shooting but that did not happen, as Respondent Carey discharged a small fraction of the rounds available in his firearm.

The difference between the conduct of Respondent Carey and that of Respondent Isnora is well recognized. The Grand Jury did not indict Respondent Carey. The Firearms Discharge Review Board Report did not find Respondent Carey to be lacking probable cause to believe that deadly physical force was necessary, as it did with regard to Respondent Isnora.

It alleges, instead, that he discharged his firearm and unnecessarily endangered innocent persons. The report cites the three people in the car. But if he had reasonable cause to believe that deadly physical force was necessary to protect Respondent Isnora from death or deadly physical injury, then using his firearm was justified. Further, the other people in the car, particularly the driver, did not appear to be innocent civilians but

²¹ Respondent Carey, during his official Department interview stated that Respondent Isnora yelled, "He's got a gun, gun, gun."

co-conspirators aiding and abetting Person B in the use of that deadly physical force.

Additionally, his testimony that he had a clear target in Person B is credible.

The Firearms Discharge Review Board report also refers to his having fired in close proximity to other officers. There is no evidence to establish that the other officers were at or near his line of fire or how, beyond the most speculative evidence, any of them was endangered by Respondent Carey's actions. It is significant that Respondent Carey testified, credibly, that he stopped shooting when Respondent Isnora came into his line of fire.

For all of the above reasons, Respondent Carey is found Not Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent Isnora's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent Isnora was appointed to the Department on July 2, 2001. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Police officers are invested with substantial power and authority. They can stop people, search them, arrest them and deprive them of their liberty and they also have the right to use deadly physical force. With that power comes a requirement that they use good and reasonable judgment. Respondent Isnora failed to utilize reasonable judgment with horrific results.

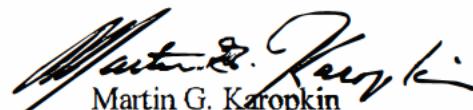
It is ironic that one of the defenses used by Respondent Isnora was the need to make a split-second life-or-death decision. That is exactly the dilemma he created for the

people in the Person A car, only they were confronted with an actual firearm pointed directly at them. It is not surprising that they panicked. Respondent Isnora's training, not to mention common sense, should have alerted him to the possibility of this kind of outcome.

Respondent Isnora is the individual who introduced the first real threat of the use of deadly physical force into the situation by producing a firearm. He did not merely have his firearm at his side and at the ready when he introduced it into the scene; he had it out in a stance threatening imminent use. He is the first to have utilized deadly physical force by firing his weapon and shouting, "Gun," actions which induced other officers to fire.

It is clear that Respondent Isnora lacks the judgment to serve as a police officer. It is therefore recommended that he be DISMISSED from the New York City Police Department.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner Trials

APPROVED

MAR 23 2012
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE GESCARD ISNORA
TAX REGISTRY NO. 928514
DISCIPLINARY CASE NO. 82789/07

In 2009 and 2010, Respondent Isnora received an overall rating of 3.5 “Highly Competent/Competent” on his annual performance evaluation. He was rated 3.0 “Competent” in 2008. He has been awarded one medal for Meritorious Police Duty. In his ten years of service, [REDACTED] [REDACTED]. He has no prior formal disciplinary record.

For your consideration.



Martin G. Karopkin
Deputy Commissioner – Trials